Supreme Court, U.S.
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Supreme Court of the United States

DONNA KAY BUSCH,
Petitioner,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the "reasonableness" of the restriction, rather than a compelling interest.

PARTIES TO THE PROCEEDING

Petitioner is Donna Kay Busch, in her individual capacity and as the parent and next friend of Wesley Busch, a minor. Respondents are Marple Newtown School District; Marple Newtown School District Board of Directors; Robert Mesaros, Superintendent of the Marple Newtown School District; and Thomas Cook, Principal of Culbertson Elementary School.

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PETITION FOR A WRIT OF CERTIORARI

Donna Kay Busch, in her individual capacity and as the parent and next friend of Wesley Busch, a minor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 1a-41a) is reported at 567 F.3d 89. The opinion of the district court (Pet. App., *infra*, 42a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2009. On August 21, 2009, Justice Alito

extended the time within which to file a petition for a writ of certiorari to and including September 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

Petitioner Donna Kay Busch brought suit against respondents in the United States District Court for the Eastern District of Pennsylvania, contending, *inter alia*, that respondent Marple Newtown School District (Marple Newtown) restricted speech in a manner that violated the Free Speech Clause of the First Amendment. The district court granted summary judgment to respondents, Pet. App. 42a-88a, and a divided panel of the Third Circuit affirmed, *id.* at 1a-41a.

A. "All About Me" Classroom Exercise

At the time of the events giving rise to this action, Wesley Busch was a kindergartener in the Marple Newtown School District. As part of the kindergarten unit of study, Marple Newtown included a classroom exercise known as "All About Me." C.A. App. 857-58. There were two stated objectives for the "All About Me" exercise: the first was for students to

identify individual interests and learn about others, and the second was for students to identify sources of conflict with others and ways that those conflicts could be resolved. *Id.* at 919. "All About Me" had been an informal part of Marple Newtown's curriculum for many years and was officially codified as part of the curriculum in 2004. *Id.* at 1007. Each kindergarten teacher had the authority to design lessons for "All About Me" and to determine whether to allow parent participation. *Id.* at 86. Consequently, choices relating to specific classroom activities were generally left to each teacher. *Ibid.*

B. Jaime Reilly's Kindergarten Class

Wesley's kindergarten teacher for the 2004-05 school year was Jaime Reilly. C.A. App. 1155-56. Ms. Reilly implemented "All About Me" by featuring a different student each week. *Id.* at 1079. Thus, each student was able to enjoy his or her own "All About Me" week. *Ibid.* During the selected student's week, the student was given the opportunity to share his or her interests with the class through multiple classroom exercises and homework assignments. *Id.* at 1081-82. At the beginning of the school year, Ms. Reilly circulated a description of "All About Me" that also invited parents to participate. *Id.* at 1084-85. The invitation stated:

> All About Me
>
> Each child will have the opportunity to share information about themselves during their "All About Me" week. To start off your child's All About Me week, please send in a poster with pictures, drawings, or magazine cut outs of your child's family, hobbies, or interests. Your child may bring in a special toy or stuffed animal

> during the week to introduce to the class. Your child may also bring in a favorite snack to share with the class during their "All About Me Week." If any parent would like to come to school to share a talent, short game, small craft, or story with us during your child's "All About Me" week please contact me 1 week in advance to schedule a day and time.

Id. at 1137. According to Ms. Reilly, the objectives of "All About Me" were met in her classroom by the students' sharing information about themselves with other students, and discussing their likes and dislikes. *Id.* at 1079.

C. Wesley Busch and His Family

Eric Busch and petitioner Donna Busch are Wesley's parents. C.A. App. 1521-22. For more than nine years, the Busch family has attended Spruce Street Baptist Church in Newtown Square, Pennsylvania. *Id.* at 1042. The Busch family routinely reads the Bible together at breakfast and before going to bed, *id.* at 1231, 1537-38, and Mrs. Busch regularly reads the Bible to her two younger boys in the morning before school, *id.* at 1537-38. Wesley also frequently asks his parents to read the Bible to him. *Ibid.* According to Wesley, the time he shares with his mother reading the Bible is special to him. *Id.* at 1639. At the time of the incident giving rise to this lawsuit, Wesley considered the Bible his favorite book. *Ibid.*

D. Preparations for Wesley's "All About Me" Week

As Wesley's "All About Me" week approached, Mrs. Busch met with Ms. Reilly to inform her that, per Ms. Reilly's invitation, Mrs. Busch wished to participate

in Wesley's week, and she sought ideas for her participation. C.A. App. 1182-83, 1197. Ms. Reilly offered Mrs. Busch several suggestions, such as reading Wesley's favorite book, preparing a dessert or snack, or one of the other items identified in the invitation to parents. *Id.* at 1198-99. After her meeting with Ms. Reilly, Mrs. Busch talked to Wesley about her coming to his classroom, and she asked him what story he would like her to read. *Id.* at 1167. Wesley told his mother that he wanted her to read from the Bible. *Ibid.* The night before her visit, Mrs. Busch decided to read the Old Testament's Psalm 118, verses 1 through 4, and verse 14. *Id.* at 1247, 1252. Those verses state:

> 1 Give thanks unto the Lord, for he is good; because his mercy endures forever.
>
> 2 Let Israel now say, his mercy endures forever.
>
> 3 Let the house of Aaron now say, that his mercy endures forever.
>
> 4 Let them now fear the Lord say, that his mercy endures forever.
>
> * * *
>
> 14 The Lord is my strength and my song, and is become my salvation.

Psalms 118:1-4, 14 (King James).

Three principal considerations led Mrs. Busch to choose verses from Psalms. C.A. App. 1248, 1250. First, she and Wesley frequently read from Psalms, and she knew Wesley liked Psalms. *Id.* at 1249. Second, she thought the children in Wesley's class would enjoy Psalms because they are similar to poetry and songs. *Id.* at 1249, 1375. Third, she

wanted to avoid references to Jesus Christ, which she believed might spark concerns. *Id.* at 1248-50.

Mrs. Busch intended to introduce herself to the students and explain that she was there for Wesley's "All About Me" week, and that Wesley had asked her to read from the Bible, his favorite book. C.A. App. 1478. Mrs. Busch intended only to read five verses from Psalm 118, and not to teach or talk about what they mean. *Id.* at 1376. If asked questions about them, Mrs. Busch intended to tell the students that Psalms are ancient poetry and something Wesley enjoys. *Id.* at 1252-53. Mrs. Busch did not plan to spend more than fifteen minutes in front of Wesley's class. *Ibid.*

E. The School District's Refusal to Permit Mrs. Busch to Read the Selected Verses

When Mrs. Busch arrived at Wesley's class, she advised Ms. Reilly that she intended to read excerpts from Psalm 118. C.A. App. 1254. Unsure of whether to allow Mrs. Busch to read from the Bible, Ms. Reilly contacted Principal Thomas Cook. *Id.* at 1102, 1268. When Principal Cook arrived, he told Mrs. Busch that she should know better than to try to read the Bible in school and that it was against the law. *Id.* at 1276-78, 1286. Principal Cook told Mrs. Busch that "reading the Bible to a kindergarten class violated the doctrine of [separation] of church and state." *Ibid.*; *see also id.* at 1024. He further stated that it was improper to read from the Bible to a class of kindergarten students because, in his view, the "Bible is holy scripture * * * * [I]t's the word of God. And * * * reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view." *Id.* at 1024-25. When Mrs. Busch informed Principal Cook that her

other son had obtained a book from the school library entitled *Gershon's Monster: A Story for the Jewish New Year*, Principal Cook responded that that book was "cultural" and continued to forbid her from reading her desired selection. *Id.* at 1277.[1] Principal Cook did not afford Mrs. Busch the opportunity to explain which verses from Psalm 118 she intended to read, or why she intended to read them. *Id.* at 1290. At Principal Cook's direction, Mrs. Busch chose a different book to read to Wesley's class. *Ibid.*; *see also id.* at 1024.

F. The District Court Decision

Ms. Busch then brought suit against respondents in the United States District Court for the Eastern District of Pennsylvania, contending, *inter alia*, that Marple Newtown had restricted speech in a manner that violated the Free Speech Clause of the First Amendment.[2] Following cross-motions for summary judgment, the district court granted summary judgment in favor of Marple Newtown. Noting that the case raises "very perplexing questions of Constitutional law," Pet. App. 55a, the district court first held that the school, at most, constituted a limited public forum, *id.* at 58a, and that, within this forum, the

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[1] In her classroom, Ms. Reilly kept a small library of books that she periodically read to her class, including several about the Jewish holidays such as *Hooray for Hanukkah* and *The Magic Dreidels*. C.A. App. 1090-92. Additionally, twice during Wesley's school year, another parent gave presentations to the kindergarten class about Hanukkah and Passover; during both, the parent read a book about the respective holiday to the class. *Ibid.*

[2] Mrs. Busch also alleged violations of the Establishment and Due Process Clauses and of the Pennsylvania Constitution. Those allegations are not at issue here.

school's conduct toward Mrs. Busch "constituted viewpoint discrimination." *Id.* at 60a; *see ibid.* ("Clearly, the school did not preclude all speech that dealt in any way with religion but precluded speech in this situation because it expressed a religious viewpoint.").

The district court then observed that the "circumstances under which viewpoint discrimination is permitted is a matter of disagreement among the Circuit Courts." *Id.* at 61a. Concluding that Mrs. Busch's speech constituted "school-endorsed" speech, the district court sided with those circuits that have interpreted *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), to hold that "where there is a likelihood of a perception of school-endorsed speech," schools "may restrict speech even based on its viewpoint 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" Pet. App. 62a (quoting *Hazelwood*, 484 U.S. at 272-73). The district court drew support from the Third Circuit's decision in *Walz* v. *Egg Harbor Township Board of Education*, 342 F.3d 271 (2003), which the district court read "as permitting viewpoint discrimination in limited circumstances when there is a valid educational purpose." Pet. App. 68a. The school's actions were permissible, the court concluded, because it had been seeking to avoid an Establishment Clause violation, which constitutes a "legitimate interest that justifies viewpoint discrimination," *id.* at 69a, and because the "All About Me" exercise was designed to "help students learn about one another," not call for the expression of "specific religious views," *id.* at 70a.

G. The Third Circuit Decision

A divided panel of the court of appeals affirmed. Relying heavily on *Walz* and citing *Hazelwood*, the

court observed that "[r]estrictions on speech during a school's organized, curricular activities are within the school's legitimate area of control"; accordingly, "[c]onsistent with its [*sic*] pedagogical goals, educators may appropriately restrict forms of expression in elementary school classrooms." Pet. App. 14a. With respect to invited speech, schools "may properly require that the solicited speech respond to the subject matter at hand," including "when parents participate in an elementary school's curricular activities." *Id.* at 15a (citing *C.H. ex rel. Z.H.* v. *Oliva*, 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("[I]f a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.")).

The court of appeals then rejected Mrs. Busch's contention that her speech should have been permitted because she "intended to express a solicited view on the pertinent subject matter"—namely, her son Wesley and his favorite things. The court held that prohibiting Mrs. Busch from reading Psalm 118 was permissible because the school "believed it proselytized a specific religious point of view," and, "as in *Walz*, the school's reasons—to prevent promotion of a religious message in kindergarten—were 'designed to prevent * * * speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval.'" *Id.* at 18a (quoting *Walz*, 343 F.3d at 280). The court concluded that "elementary school administrators and teachers should be given the latitude within a range of reasonableness related to preserving the

school's educational goals," and that the school's actions "were not unreasonable." *Id.* at 20a.[3]

Judge Hardiman dissented. He first criticized the majority's failure to distinguish between content and viewpoint discrimination. Reviewing Supreme Court precedent, Judge Hardiman noted that "viewpoint discrimination occurs when the government targets not just subject matter, but also particular views taken by speakers on a subject." *Id.* at 26a. He also observed that the Supreme Court has "consistently held that discrimination based on the religious character of speech is properly classified as viewpoint discrimination." *Ibid.* Echoing the district court, Judge Hardiman stated that "this case involves viewpoint discrimination," inasmuch as Mrs. Busch's "attempt to read Psalm 118 to her son's class fell within the specified subject matter—*i.e.*, something of interest to her son and important to his family—and the sole reason for excluding her speech was its religious character." *Id.* at 29a.

Second, Judge Hardiman argued that the majority's reliance on *Walz*, which in turn relied on *Hazelwood*, was misplaced. *Hazelwood* "is limited to situations in which the speech may be interpreted as coming from the school itself," and Judge Hardiman found "no risk that Busch's speech would 'bear the imprimatur of the school.'" *Id.* at 34a (quoting *Hazelwood*, 484 U.S. at 271). Judge Hardiman observed that "[e]verything from the title of ["All About Me"]—to the specific requests made by the teacher,

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[3] Judge Barry concurred, observing that she found "something unsettling about this case and others like it" but nevertheless joined the majority opinion because it "correctly applie[d]" Third Circuit precedent. Pet. App. 24a (Barry, J., concurring).

indicated that the student (or, in reality, the parent) was speaking and not the school." *Id.* at 34a-35a.

Finally, Judge Hardiman concluded that even accepting the majority's view that Mrs. Busch's speech constituted "school-endorsed" speech under *Hazelwood*, the school's conduct was not justified. "In holding that a school may regulate school-sponsored expressive activities so long as the regulation is 'reasonably related to legitimate pedagogical concerns,'" according to Judge Hardiman, *Hazelwood* permits discrimination "on the basis of *content*," and does not "offer any justification for allowing educators to discriminate based on *viewpoint* absent a compelling government interest." *Id.* at 37a. He noted that "the question of whether school-sponsored speech can discriminate on the basis of viewpoint remains open" and the "courts of appeal are split on this issue." *Id.* at 38a. Rejecting the majority's position, Judge Hardiman concluded that while "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," it "does not follow * * * that the state may regulate one's viewpoint merely because speech occurs in a schoolhouse." *Id.* at 40a.

REASONS FOR GRANTING THE PETITION

A divided Third Circuit panel held in this case that a public school may engage in viewpoint-related discrimination so long as the school's justification falls within a "range of reasonableness related to preserving the school's educational goals." Pet. App. 20a. In so holding, the court of appeals endorsed a construction of this Court's decision in *Hazelwood* that, as both the district court and dissent observed, has divided the circuits. Three circuits, including the

Third Circuit, have read *Hazelwood* to permit public schools to restrict school-sponsored speech on the basis of viewpoint so long as the restrictions are reasonably related to legitimate pedagogical concerns. Three other circuits, however, have rejected this interpretation and the proposition that *Hazelwood* created an exception to this Court's longstanding instruction that viewpoint-based speech restrictions, even in the school setting, may only be justified by a compelling government interest. The Third Circuit's decision, moreover, is flawed, for this Court has never sanctioned the use of viewpoint-based speech restrictions absent anything less than a compelling government interest. The malleable standards of "reasonableness" and "pedagogical concerns" that the Third Circuit adopted depart from well-established precedent. This case therefore presents an issue of exceptional importance that warrants the Court's review.

ARGUMENT

A. The Circuits Are Split As To Whether Public Schools May Restrict Speech Based on Viewpoint Absent a Compelling Interest

As both the district court and dissent below observed, the courts of appeals are squarely split over whether a public school may place viewpoint-related restrictions on speech in the absence of a compelling interest. Three circuits, including the Third Circuit, have interpreted this Court's decision in *Hazelwood* to hold that a school may engage in viewpoint discrimination so long as the restrictions are reasonably related to a school's educational goals. Three circuits have held otherwise, concluding that

Hazelwood did not *sub silentio* disrupt longstanding precedent requiring the government to demonstrate a compelling interest before engaging in viewpoint-based restrictions. This Court's review is necessary to resolve these widely divergent positions and clarify the standard that a school must satisfy in order to restrict speech on the basis of viewpoint.

1. Circuits Requiring Viewpoint Neutrality Absent a Compelling Government Interest

Three circuits have found that public schools' restrictions on speech during school-sponsored activities must be viewpoint-neutral absent a compelling government interest. The Eleventh Circuit, for example, has expressly rejected the proposition that *Hazelwood* permits school officials to engage in viewpoint discrimination. *Searcey* v. *Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). It held instead that "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*," it does not "offer[] any justification for allowing educators to discriminate based on viewpoint." *Id.* at 1325. Accordingly, while *Hazelwood* "did not discuss viewpoint neutrality," the Eleventh Circuit stated, "[t]here is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views." *Id.* at 1319 n.7. The "prohibition against viewpoint discrimination is firmly embedded in first amendment analysis," the court concluded; thus, it would "continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325. *See also Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir.

2005) ("*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint.").

Similarly, the Second Circuit has rejected the proposition that "*Hazelwood* permits schools to discriminate on the basis of viewpoint—so long as such discrimination is, itself, reasonably related to a legitimate pedagogical interest." *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005). Similar to the circumstances here, the plaintiffs in *Peck*, a kindergarten student and his parents, alleged violations of free speech after the student's school censored a poster made for a school assembly in response to an assignment on the environment, which included images of Jesus and the church in addition to environmental images. *Id.* at 620-23. Vacating the district court's grant of summary judgment to the school district, the Second Circuit "decline[d] * * * to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection." *Id.* at 633. Rather, it concluded "that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." *Ibid.* (emphasis added).

The Ninth Circuit, too, has read *Hazelwood* to require viewpoint neutrality absent a compelling government interest. In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District,* 941 F.2d 817 (9th Cir. 1991) (en banc), the court held that a school district's refusal to publish abortion related advertisements in a high school yearbook was "not an effort at viewpoint discrimination," *id.* at 830, and, accordingly, was subject to the more relaxed "reasonableness" standard articulated

in *Hazelwood*, *id.* at 829. In so holding, the court cited prior Supreme Court decisions requiring viewpoint neutrality in nonpublic and limited public forums. *See ibid.* (citing *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). The Ninth Circuit has subsequently confirmed that *Planned Parenthood* "incorporated [a] 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000).[4]

2. Circuits Permitting Viewpoint-Based Restrictions Absent A Compelling Government Interest

In addition to the Third Circuit below, which sanctioned viewpoint discrimination by a public school where the restriction was "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a, two other circuits have held that, after *Hazelwood*, a school may place viewpoint-based restrictions on school-sponsored speech provided the regulation relates to pedagogical interests. The Tenth Circuit, in *Fleming* v. *Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002), expressly held that "*Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech." *Id.* at 926. Noting the disagreement among the circuits on the question, *ibid.*, the

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[4] In *Kincaid* v. *Gibson*, 191 F.3d 719 (6th Cir. 1999), a panel of the Sixth Circuit construed *Hazelwood* as allowing "reasonable, non-viewpoint-based restriction[s]." *Id.* at 727. The en banc court, however, granted rehearing and reversed on other grounds. See 236 F.3d 342 (6th Cir. 2001).

court concluded that *Hazelwood* "does not require educators' restrictions on school-sponsored speech to be viewpoint neutral" because, in part, *Hazelwood* "makes no mention that the school's restriction must be neutral with respect to viewpoint," *id.* at 928. Accordingly, it permitted the school to exclude religious symbols from a school memorial display, finding these viewpoint-based restrictions to be "reasonably related to a pedagogical interest." *Id.* at 932-34.

Furthermore, the First Circuit has squarely held that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward* v. *Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). Like the Third Circuit below, the First Circuit instead observed that "whether a regulation is reasonably related to legitimate pedagogical concerns"—the standard of *Hazelwood*— "will depend on, among other things, the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of the presentation." *See* Pet. App. 12a ("[T]he appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity." (quoting *Walz*, 342 F.3d at 278)).[5]

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[5] In *C.H. ex rel. Z.H.* v. *Oliva*, 195 F.3d 167 (3d Cir. 1999), a panel of the Third Circuit observed that "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored activities so long as those restrictions are reasonably related to legitimate pedagogical concerns." *Id.* at

3. The Circuit Conflict Calls For Supreme Court Review

As set forth above, the courts of appeals are squarely and evenly divided on the application of *Hazelwood* to viewpoint-based discrimination and the showing a public school must make before restricting speech on the basis of viewpoint. Moreover, courts on both sides of the split—as well as the district court and dissent below—have recognized the disarray and have remarked upon the lack of clarity on this question following *Hazelwood*. *See Peck*, 426 F.3d at 631-32 ("Whether *Hazelwood* represents a departure from the long-held requirement of government neutrality in any and all government restriction of private speech is an issue that has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions." (citation omitted)); *id.* at 632 (noting that the question is "anything but clear"); *Downs*, 228 F.3d at 1010 n.2; *Fleming*, 298 F.3d at 926 ("Our sister circuits have split over whether *Hazelwood* requires that schools' restrictions on school-sponsored speech be viewpoint neutral."); *see also Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) (stating that "[a] split exists among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality" but declining to consider the question).[6] This clear, recognized, and balanced split among the circuits warrants this Court's review.

172-73. The en banc court, however, granted rehearing and ultimately resolved the case on procedural grounds without addressing the viewpoint neutrality question. See 226 F.3d 198 (3d Cir. 2000).

[6] Recent academic commentary has also highlighted the divide and the need for greater clarity. *See* Emily Gold Waldman, *Returning To Hazelwood's Core: A New Approach To*

B. The Court of Appeals' Decision Is Erroneous

The Third Circuit erred in holding that Marple Newtown's viewpoint-based restriction of the speech here was permissible because it was "within a range of reasonableness related to preserving the school's educational goals." This Court has never sanctioned viewpoint-based speech restrictions absent anything less than a compelling government interest. *Hazelwood* does not provide to the contrary: Its holding that a school may restrict school-sponsored speech if "reasonably related to legitimate pedagogical concerns" arose only in the acknowledged context of restrictions based on content, not viewpoint. The Third Circuit's endorsement of viewpoint-based speech restrictions that are "not unreasonable" is not supported by *Hazelwood* or any other decision of this Court. Its departure from well-established First Amendment principles calls for this Court's review.

1. This Court's Precedent Does Not Permit Viewpoint-Based Discrimination Absent a Compelling Governmental Interest

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. As this Court has

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Restrictions On School-Sponsored Speech, 60 Fla. L. Rev. 63, 64 (2008) ("[A] sharp split has developed over whether *Hazelwood* goes so far as to permit viewpoint-based speech restrictions, which are generally prohibited under the First Amendment."); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U. L.J. 175, 191 (2007) ("The courts are deeply divided on how to crucially interpret *Hazelwood*.").

repeatedly noted, the government's ability to restrict speech typically varies depending on the particular forum involved. *See Cornelius*, 473 U.S. at 806; *Peck*, 426 F.3d at 625-26. Even in non-public forums, however, in which the government is afforded the greatest latitude in regulating speech, the Court has consistently held that speech restrictions must remain viewpoint-neutral. *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) ("[W]hen the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (quoting *Cornelius*, 473 U.S. at 806) (citing *Perry*, 460 U.S. at 46))); *cf. Tinker* v. *Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969) (prohibiting the "expression of one particular opinion" by students without evidence of potential disruption).

The reason for such vigilance is clear: viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Perry*, 460 U.S. at 62 (Brennan, J., dissenting) (remarking that "viewpoint discrimination is censorship in its purest form"). Accordingly, while "a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum * * * or if he is not a member of the class of speakers for whose especial benefit the forum was

created," the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Furthermore, "[t]he Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination." *C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting); *see also Lamb's Chapel*, 508 U.S. at 393 ("[I]t discriminates on the basis of *viewpoint* to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" (emphasis added)); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-30 (1995) (holding that university guidelines prohibiting religious student publication from benefiting from student activities fund constituted unconstitutional viewpoint discrimination). Accordingly, speech restrictions based on religion constitute viewpoint discrimination, permissible at most only if the government can demonstrate a compelling interest in imposing such restrictions. *See, e.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112-13 (2001); *Lamb's Chapel*, 508 U.S. at 395; *cf. Morse* v. *Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting) (remarking that "censorship that depends on the viewpoint of the speaker * * * is subject to the most rigorous burden of justification"); *see also C.H.*, 226 F.3d at 211 (Alito, J., dissenting) ("It follows that public school authorities may not discriminate against student speech based on its religious content if the discrimination cannot pass strict scrutiny.").

2. *Hazelwood* Did Not Establish an Exception Permitting Viewpoint-Based Discrimination In a School Setting

Contrary to the view of the Third Circuit, the Court's decision in *Hazelwood* did not depart from the long line of authority holding that viewpoint-based speech restrictions are impermissible absent a compelling government interest. In *Hazelwood*, the Court upheld a principal's deletion of articles on teen pregnancy and divorce from a school-sponsored newspaper. It concluded that school-sponsored speech, that is, expression that others "might reasonably perceive to bear the imprimatur of the school," *id.* at 271, may be regulated by a school so long as its "actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Three features of *Hazelwood*, however, reveal that the standard it articulated applies only to content-based regulation, and not viewpoint-based discrimination.

First, the facts of *Hazelwood* did not offer the Court occasion to disturb well-established precedent concerning viewpoint-based discrimination. The school in *Hazelwood* conceded that any restrictions on the newspaper had to be viewpoint-neutral. *See id.* at 287 n.3 (Brennan, J., dissenting). Indeed, the articles at issue were removed because of their subject matter; there was no indication that the principal was motivated by disagreement with the views expressed in the articles, which themselves did not take a position on the subjects but merely described students' experiences. *See id.* at 263.

Second, the Court itself expressly held that "educators do not offend the First Amendment by exercising editorial control over the *style* and *content* of" school-sponsored speech "so long as their actions are rea-

sonably related to legitimate pedagogical concerns." *Id.* at 273 (emphases added). The Court's choice of words reflects an understanding that content-based restrictions are permissible in circumstances falling short of a compelling government interest. The Court did not suggest, however, that this standard applies to viewpoint-based restrictions, long the most "egregious" form of government censorship, *Rosenberger*, 515 U.S. at 829.

Third, the precedent *Hazelwood* drew upon illustrates an intention to limit its holding to content-based speech restrictions, and not viewpoint-based regulation. In determining the type of forum the school created by establishing and offering a student newspaper, the Court relied considerably on its prior decisions in *Cornelius* and *Perry*. *See* 484 U.S. at 267-70. Both decisions squarely hold that the First Amendment precludes the government from engaging in viewpoint-based discrimination. *See Cornelius*, 473 U.S. at 811; *Perry*, 460 U.S. at 46. Yet *Hazelwood* never distinguished these cases in announcing a lower standard. It would be odd to suggest that the Court extensively cited *Cornelius* and *Perry*, which plainly and unconditionally prohibit viewpoint discrimination, but then overruled them in part. This is especially unlikely in view of *Hazelwood*'s reference to "style and content," rather than viewpoint.

3. The Third Circuit Erroneously Endorsed a View of *Hazelwood* Permitting Viewpoint-Based Discrimination Absent a Compelling Interest

The Third Circuit's decision below erred in endorsing a view of *Hazelwood* that permits schools to engage in viewpoint-based discrimination of speech so long as the restriction is "within a range of reasonableness related to preserving the school's educational goals." Pet. App. 20a. Citing *Hazelwood* and *Walz*, a circuit precedent relying on *Hazelwood*, the court held that "*specific religious messages*" could, "consistent with * * * pedagogical goals," be "appropriately restrict[ed]." *Id.* at 14a; *see also id.* at 15a (schools may prohibit "specific messages"). It then applied a "reasonableness" standard to evaluate the viewpoint-based responses of the school to Mrs. Busch's planned speech, concluding that they were "not unreasonable."[7] This reasoning has no support in *Hazelwood* or in any precedent of the Court, all of which require a compelling interest in order to justify a viewpoint-based restriction on speech.

Moreover, the Court's application of a "reasonableness" standard to the facts of the case directly contravenes the instruction of this Court. Mrs. Busch argued below that "once she was invited to speak,

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[7] There is no dispute in this case that Marple Newtown's response to Mrs. Busch's attempted speech constituted viewpoint discrimination. The district court so found, *see* Pet. App. 60a, and Marple Newtown did not challenge that finding on appeal, *see id.* at 30a (Hardiman, J., dissenting) ("Donna Busch was denied the opportunity to read the story her son chose because it expressed a *religious viewpoint*, rather than a secular one. This plainly constituted viewpoint, not subject matter, discrimination.").

any restriction on her speech was impermissible so long as her speech was about Wesley." Pet. App. 17a. *Cornelius* counsels that the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806 (emphasis added). The Third Circuit, however, upheld the school's actions because the principal believed Mrs. Busch's speech—regardless of whether it fell within the purview of the "otherwise includible subject" of her son and his favorite things—constituted "a specific religious point of view." Pet. App. 18a. Permitting such a "point of view," the court held, would "be at cross-purposes with [the school's] educational goals," and thus the school could forbid it. But such a position is squarely "at cross-purposes with" *Cornelius*, demonstrating the Third Circuit's misreading of this Court's precedent.

Finally, the Third Circuit's decision, like those of other circuits that have adopted a relaxed standard for assessing viewpoint-based restrictions, is not only unfounded but unwise. The decision leaves neither public school administrators nor students, parents, or any other party with any clear guidance as to when a school may or may not suppress a particular viewpoint in the context of school-sponsored activity. Contrary to the more rigorous "compelling interest" standard, "reasonableness" and "pedagogical objectives" are malleable concepts that schools could use to justify any view-point-based restriction. *Cf. Morse*, 551 U.S. at 409 ("[M]uch political and religious speech might be perceived as offensive to some."); *id.* at 423 (Alito, J., concurring) (deeming an argument that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission'" as one that "can

easily be manipulated in dangerous ways"). Indeed, in this case, *allowing* Mrs. Busch's participation would have met the pedagogical objective of the assignment, which was to recognize individual student interests and identify sources of conflict and their resolution. Moreover, as Judge Hardiman stated in dissent, "[i]f schools could impose viewpoint-based restrictions on all student speech that might be perceived as school-sponsored, the promise of *Tinker*—that students 'do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'—would mean very little." Pet. App. 38a (Hardiman, J., dissenting) (quoting 393 U.S. at 506). This Court's intervention is therefore necessary to correct the incorrect and imprudent decision of the Third Circuit below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

AMENDED PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 07-2967

DONNA KAY BUSCH, IN HER INDIVIDUAL CAPACITY AND AS THE PARENT AND NEXT FRIEND OF WESLEY BUSCH, A MINOR

v.

MARPLE NEWTOWN SCHOOL DISTRICT; MARPLE NEWTOWN SCHOOL DISTRICT BOARD OF DIRECTORS; ROBERT MESAROS, SUPERINTENDENT OF THE MARPLE NEWTOWN SCHOOL DISTRICT; THOMAS COOK, PRINCIPAL OF CULBERTSON ELEMENTARY SCHOOL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 05-cv-02094
(District Judge: Honorable R. Barclay Surrick)

Argued May 5, 2008
Before: SCIRICA, *Chief Judge,*
BARRY and HARDIMAN, *Circuit Judges.*

(Filed: June 1, 2009)

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OPINION OF THE COURT

SCIRICA, *Chief Judge.*

Plaintiffs, who are mother and son, bring free speech, establishment, and equal protection claims against Defendants, who are school officials and the school district. These claims stem from an elementary school's restriction of the mother's effort to read aloud from scripture to students in her son's kindergarten classroom as part of a curricular "show and tell"- type activity. The District Court granted summary judgment in favor of Defendants on all claims. We will affirm.

I

Donna Kay Busch[1] is the mother of Wesley Busch, a kindergarten student at Culbertson Elementary School of the Marple Newtown School District, who was age five at the time this matter arose. Busch describes herself as an Evangelical Christian,[2] and Wesley shares his mother's religious beliefs. Busch and Wesley routinely read the Bible together at breakfast and before going to bed, and Wesley often carries the Bible with him.

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[1] Because Donna Kay Busch brings claims on Wesley's behalf, we will refer to her as the central litigant.

[2] Busch testified that an Evangelical Christian is "someone who believes . . . the Bible is the literal word of God." Her husband described an Evangelical as "one who brings God's word to the world."

In October 2004, as a student in teacher Jaime Reilly's kindergarten class, Wesley participated in a curricular unit called "All About Me." The unit was part of the social studies curriculum and was designed to be a "socialization" program in which students would "identify individual interests and learn about others" and would "identify sources of conflict with others and ways that conflicts can be resolved."

Each student in Reilly's class was featured during his or her own "All About Me" week, and during the designated week, the curriculum called for the student's participation in three ways. First, each student was given the opportunity to "share information about themselves [sic]" by bringing in "a poster with pictures, drawings or magazine cut outs of [his or her] family, hobbies or interests." Second, the student was also permitted to bring a snack to share as well as a special toy or stuffed animal to introduce to the class. Third, Reilly invited parents to participate in the unit by visiting the school to "share a talent, short game, small craft, or story" with the class during their child's designated week.

As one aspect of Wesley's participation in his "All About Me" week, he made a poster with his mother that included photographs of himself with his hamster, his brothers, his parents, his best friend at the time, and a picture of a church cut out from construction paper. Busch testified that she wrote what Wesley asked her to write under the picture of the church: "I love to go to the House of the Lord" or "I like to go to church" or "something like that." The poster was displayed in Wesley's classroom. And Wesley, like other students, had the opportunity to present his poster to the class and talk about the various items on it.

On October 15, 2004, Busch was scheduled to visit Wesley's class to participate in his "All About Me" week. She told Wesley that Reilly invited her to visit class and read his favorite book. When she asked him what he would like her to read, Wesley responded, "the Bible."[3]

The night before her visit to Wesley's class, Busch, alone, without Wesley, pondered what passage she would read from the Bible. Eventually she selected verses 1 through 4 and verse 14 of Psalm 118 from the King James Bible:

> 1. Give thanks unto the Lord, for he is good; because his mercy endures forever.
>
> 2. Let Israel now say, his mercy endures forever.
>
> 3. Let the house of Aaron now say, that his mercy endures forever.
>
> 4 Let them now that fear the Lord say, that his mercy endures forever.
>
> * * *
>
> 14. The Lord is my strength and my song, and is become my salvation.

Busch testified she chose these verses because (1) she and Wesley frequently read from the Book of Psalms; (2) she thought the children would like Psalms because they are similar to poetry; and (3) she desired a reading that did not make reference to Jesus, which she worried might upset some people given what she perceived in the past as hostility in

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[3] Wesley's babysitter, Judy Harper, testified that Wesley's favorite book in kindergarten was *Brown Bear, Brown Bear*. Nevertheless, on summary judgment, we assume that Wesley's favorite book was the Bible and that the Bible was chosen according to his preference.

the school district towards her Christian beliefs. She also testified that she intended to read the verses to the students without explanation and that, if asked questions about the reading, she would respond that "it was ancient psalms and ancient poetry and one of Wesley's favorite things to hear."

On the morning she was supposed to read to Wesley's class, Busch informed Reilly of her decision to read from the Bible. Reilly said she would have to check with the school's principal, Thomas Cook, who then arrived and spoke to Busch in the hallway. He told Busch reading the Bible to the class would be "against the law . . . of separation of church and state" and asked her to read from another book. Principal Cook testified he determined it was improper to read from the Bible to a class of kindergarten students because he believed "the Bible is holy scripture . . . [I]t's the word of God. And . . . reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view."[4] Busch testified that she remembered Cook using the word "proselytizing" and that she understood him to be saying it was against the law for her to try to "convert souls."

Busch objected, telling Cook that her other son, age six, had just finished reading a book called *Gershon's Monster: A Story for the Jewish New Year,* which he had obtained from the school library. Cook responded: "Well, that's cultural and your son chose

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[4] Robert Mesaros, Superintendent of the Marple Newtown School District, later supported Principal Cook's response to Busch based on the captive nature of the classroom audience, the parent appearing to "tak[e] the place of the teacher" in the classroom, and the likely perception that the school district was advocating or supporting whatever was going to be read.

that book and these children are not choosing to hear from the Bible . . . . I can't let you do it." Reilly offered Busch another book to read, and they settled on a book about counting. Reilly testified the hallway conversation was inaudible in the classroom, she never spoke with Wesley or the other children about the incident, and she did not notice any change in Wesley's behavior or demeanor that day.

Other parents also participated in their children's "All About Me" weeks by reading stories to the class, sharing snacks, and doing crafts. Among the stories read by parents were: *The Grinch Who Stole Christmas, The Jolly Roger,* and *Green Eggs and Ham.* Reilly also keeps a library of books from which she periodically reads to Wesley's class. Among those books are several about holidays, including: *Bear Stays Up for Christmas, Froggy's Best Christmas, The Wild Christmas Reindeer, Ten Timid Ghosts on a Christmas Night, Christmas Trolls, The Best Easter Eggs Ever, Easter Bunny's On His Way, The Night Before Easter, Hooray for Hanukkah, The Magic Dreidels,* and *The Hanukkah Mice.*

Additionally, one parent, Linda Lipski, visited Reilly's class twice during the year to give presentations on Hanukkah and Passover that were planned in advance with Reilly. During Hanukkah, Lipski brought in a menorah and a dreidel and read "a Blue's Clues Hanukkah story." Later in the year, during the Passover holiday, Lipski "read *The Matzoh Ball Fairy* to the students and then offered them matzoh ball with chicken soup."[5] Reilly set up

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[5] Reilly testified *The Matzoh Ball Fairy* is about a "family [that] eats matzoh balls[,] and they float because the matzoh balls were light and fluffy."

Lipski's presentation by discussing Easter and Passover. She also discussed Christmas and Kwanzaa as part of the winter holiday unit in the social studies curriculum, and recalled a picture of a Christmas tree hanging in the classroom at the time of the Hanukkah presentation. Reilly explained she was comfortable permitting the holiday materials and presentations because (1) the holidays were part of the official social studies curriculum, (2) the menorah and dreidel were symbols used on activity sheets in that curriculum, and (3) they appeared consistent with the Marple Newtown School District's policy on holiday observances.

On May 3, 2005, Busch filed this lawsuit on behalf of herself and Wesley against the Marple Newtown School District, the Marple Newtown School District Board, School District Superintendent Robert Mesaros, and School Principal Thomas Cook, asserting six claims: (1) violation of the Free Speech Clause of the United States Constitution; (2) violation of the Free Communication Clause of the Pennsylvania Constitution; (3) violation of the Establishment Clause of the United States Constitution; (4) violation of the Establishment Clause of the Pennsylvania Constitution; (5) violation of the Equal Protection Clause of the United States Constitution; and (6) violation of the guarantee of equal rights and the prohibition on discrimination in the Pennsylvania Constitution.[6]

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[6] Regarding the state speech claims, the Pennsylvania Supreme Court has identified several factors to guide an analysis of whether differences exist between federal and state constitutional provisions. *Pap's A.M. v. City of Erie,* 812 A.2d 591, 603 (Pa. 2002) *(citing Commonwealth v. Edmunds,* 586 A.2d 887, 895 (Pa. 1991)). Plaintiff has not addressed any of these factors, and our own consideration of them does not indicate the Pennsylvania Constitution differs from the federal constitution in the

Busch seeks a declaratory judgment, actual and nominal damages, and costs and fees.

Following cross motions for summary judgment, the District Court granted summary judgment in favor of the Defendants and against Busch on all claims. This appeal followed.[7]

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area of school speech. To the contrary, Pennsylvania state courts have followed federal constitutional principles when considering the speech of teachers in Pennsylvania classrooms, *see Fink v. Bd. of Educ. of Warren County Sch. Dist.*, 442 A.2d 837, 839-40, 841-42 (Pa. Commw. Ct. 1982) (holding the school did not violate the teacher's constitutional rights by prohibiting the teacher from reading the Bible in class), and as a matter of state policy—relevant to the Pennsylvania constitutional analysis—the Pennsylvania legislature has expressed a preference that religious texts not be introduced to younger students. 24 Pa. Stat. Ann. § 15-1515 (West 2006). Accordingly, we believe the analysis of Busch's free speech claims under the United States Constitution is dispositive of her claims under the Free Communications Clause, Article I, § 7, of the Pennsylvania Constitution.

Busch's state establishment and equal protection claims are likewise disposed of by the relevant provisions of the federal constitution. *Springfield Sch. Dist. v. Dep't of Educ.*, 397 A.2d 1154, 1170 (Pa. 1979) ("[T]he provisions of Article I, Section 3 of [the Pennsylvania] constitution do not exceed the limitations in the first amendment's establishment clause."); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) ("[T]he meaning and purpose of the Equal Protection Clause of the United States Constitution and the state Constitution's prohibition against special laws are sufficiently similar to warrant like treatment, and. . . contentions concerning the two provisions may be reviewed simultaneously." (citations omitted)).

[7] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291 to review the District Court's grant of summary judgment. Our review is plenary, and we apply the same standard as the District Court. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d

II

A

The elementary school setting—and particularly the kindergarten classroom—is a unique forum for purposes of considering competing First Amendment and pedagogical interests. Unlike parks, streets, and other traditional public fora, elementary school classrooms are not places for unlimited debate on issues of public importance. *See Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260,267 (1988). Most of the time, school classrooms are reserved for teaching students in a structured environment. *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.,* 342 F.3d 271, 275-76 (3d Cir. 2003). Public schools may take on characteristics of public fora by "intentionally opening" facilities for "public discourse." *Hazelwood Sch. Dist.,* 484 U.S. at 267 *(quoting Cornelius v. NAACP Legal Def and Educ. Fund, Inc.,* 473 U.S. 788, 802 (1985)); *id.* ("[S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." *(quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 47 (1983), *and citing Perry Educ. Ass'n,* 460 U.S. at 46 n.7)); *see also Good News Club v. Milford Cent.*

1224, 1230 (3d Cir. 1993). Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [school district] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party:" in this case, the plaintiffs. *Combs v. Homer-Ctr. Sch. Dist.,* 540 F.3d 231, 235 n.5 (3d Cir. 2008) (citation omitted).

Sch., 533 U.S. 98, 102, 106-07 (2001) (opening school facilities to community groups after school hours); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524-26 (3d Cir. 2004) (opening school facilities to a "broad array of community groups"). But in classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved. Speech occurring during these activities may be regulated under standards different from those that would apply in public fora.

In the elementary school classroom, "the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity." *Walz*, 342 F.3d at 278; *see also id.* at 275 ("In the elementary school setting, age and context are key."). As we have explained, "the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise."[8] *Id.* at 276. "While secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis, kindergartners and first graders are different." *Id.* at 277 (internal quotation

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[8] "[A]ny analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student." *Walker-Serrano by Walker v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003).

marks and citation omitted). For elementary school students, "the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals." *Id.*

Restrictions on speech during a school's organized, curricular activities are within the school's legitimate area of control because they help create the structured environment in which the school imparts basic social, behavioral, and academic lessons. *Id.* at 275-76. The curricular standards applied during these activities, "especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned." *Id.* at 277; *see also Hazelwood Sch. Dist.*, 484 U.S. at 271 ("Educators are entitled to exercise greater control over [school-sponsored expressive activities] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.").

Some classroom discussion of religion or religious practices may be consistent with appropriate curricular standards, but classroom speech promoting religion or specific religious messages presents special problems for educators. *See Walz*, 342 F.3d at 280 ("[P]roselytizing speech . . . if permitted, would be at cross-purposes with [the school's] educational goal and could appear to bear the school's seal of approval."); *id.* at 278 ("For a student in 'show and tell' to pass around a Christmas ornament or a drei-

del, and describe what the item means to him, may well be consistent with the activity's educational goals . . . . Nevertheless, in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message."); *cf Edwards v. Aguillard,* 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary."). Consistent with its pedagogical goals, educators may appropriately restrict forms of expression in elementary school classrooms.

Whether a school invites or solicits speech from students helps determine whether student speech is consistent with the school's pedagogical goals. But the fact the speech was invited during a curricular activity does not necessarily prevent the school from limiting the student's response. The school may properly require that the solicited speech respond to the subject matter at hand. *See C.H. ex rel. Z.H. v. Oliva,* 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("Public school teachers have the authority to specify the subjects that students may discuss in class and the subjects of assignments that students are asked to complete. Thus, if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead." (citations omitted)). And the school may require classroom responses conform to the mode of presentation requested. *Walz,* 342 F.3d at 279. That is, when invitations for student expres-

sion are intended to elicit descriptive responses, the school may limit the responses accordingly.

Likewise, when parents participate in an elementary school's curricular activities, the school may impose the same requirement—that they refrain from promoting specific messages in class. The school's pedagogical considerations are present, and are perhaps heightened, when a parent is the speaker because parents, much like teachers, are typically held in high regard and viewed as authoritative by young children. By inviting participation in curricular activities, educators do not cede control over the message and content of the subject matter presented in the classroom. Were teachers or school administrators required to do so, individual students or parents could use the classroom to promote any message in the guise of a pedagogically approved curricular activity.

Educators should be free to seek appropriate ways to involve parents in the education of their children. *See* Brief of Nat'l Sch. Bds. Ass'n and Pa. Sch. Bds. Ass'n as Amici Curiae Supporting Appellees at 4 (recognizing "the need to avoid creating legal disincentives for schools to do all they can to engage parents in their children's educations"). Yet the value and frequency of these efforts could be jeopardized if parents—once invited into the classroom to share details about their family experience as part of "show and tell" activities—could express any message of their choosing so long as it related in some way to their child. *See id.* (explaining that inability to exercise discretion would "force school districts to re-evaluate parent participation in school projects on the basis that they can ill afford the loss of control over the curriculum, legal complications, and poten-

tial liabilities"); *id.* at 10 *("Amici* submit that activities which take place during instructional time in public schools must be subject to school control, and that the mere invitation to parents to help out with classroom activities or homework assignments cannot result in carte blanche to teach anything one pleases to a captive audience of public school students."). In the elementary school setting, and particularly at the kindergarten level, educators would face the dilemma of either foregoing valuable curricular activities or foregoing the ability to control the pedagogical direction of their classrooms.

B

In this case, Donna Busch sought to read aloud passages from the Bible to students in a kindergarten classroom, with the teacher present, as part of a curricular exercise. In this context, the school was concerned she would "promote a religious message through the channel of a benign classroom activity." *Walz,* 342 F.3d at 280.

Busch contends the nature of the "All About Me" exercise alters the context of the speech in two ways. First, she contends the activity's focus on Wesley during his "All About Me" week prevented any perception of school endorsement. "Show and tell" exercises—commonplace in elementary school curricula—are valuable pedagogical tools for furthering the behavioral and social development of children. But like other curricular activities in the kindergarten classroom, "show and tell" assignments generally presume the school may limit the content of the presentations. *Cf. id.* at 278 ("[I]n the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message."). Moreover, unlike in *Walz,* the speaker

here was not a student. That it was a student's parent further blurs "the line between school-endorsed speech and merely allowable speech." *Id.* at 277.

Second, pointing to our statement in *Walz* that "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected," *id.* at 279, Busch contends her speech should have been permitted because she intended to express a solicited view on the pertinent subject matter. That is, the school invited her to participate in Wesley's "All About Me" week, where "all about Wesley" was the subject matter, and she intended to present a viewpoint about Wesley. Accordingly, Busch contends that once she was invited to speak, any restriction on her speech was impermissible so long as her speech was about Wesley.[9]

The school need not choose, however, between soliciting information about students as part of curricular activities and opening the classroom to any content the speaker chooses to disseminate. In crafting a curriculum, school officials face the sensitive task of exposing children to diverse traditions and cultural expe-

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[9] At her deposition, Busch testified that the school would not be able to restrict a parent in Wesley's class who, as part of his or her child's "All About Me" week, wished to read material advocating extreme violence and discrimination. We think it is fair to discount these statements, which were elicited by opposing counsel's pointed questioning. When presented with less provocative hypothetical scenarios at oral argument on this appeal, however, Busch's attorney similarly asserted that no line drawing by the school would have been permissible so long as a parent's message related to his or her child. The gist of Busch's testimony and counsel's argument is that Busch believes schools must choose between allowing all invited parent speech or allowing none at all.

riences while also remaining mindful of the expectations and rights of the children and their parents. Principal Cook disallowed a reading from holy scripture because he believed it proselytized a specific religious point of view. As in *Walz,* the school's reasons—to prevent promotion of a religious message in kindergarten—were "designed to prevent . . . speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." *Id.* at 280.

Busch also contends the school's restriction of her speech was unrelated to the legitimate purpose of avoiding promotion of religious messages generally but was instead motivated by its desire to censor her and Wesley's particular religious beliefs. That is, the school was unconcerned with proselytizing generally and only concerned with her Christian messages. She bases her contention on a general assertion that the school had previously exhibited animosity toward her faith while tolerating the presentations of parents of other faiths in Wesley's classroom. Specifically, she points to the two presentations by Linda Lipski on Hanukkah and Passover. As noted, during Hanukkah, Lipski brought in a menorah and a dreidel and read "a Blue's Clues Hanukkah story." On the Passover holiday, Lipski read *The Matzoh Ball Fairy* to the students and then offered them matzoh ball with chicken soup.[10]

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[10] Busch also acknowledged that Wesley's teacher keeps a library of books she periodically reads to Wesley's class. Several of these books are about holidays, including *Bear Stays Up for Christmas, Froggy's Best Christmas, The Wild Christmas Reindeer, Ten Timid Ghosts on a Christmas Night, Christmas Trolls, The Best Easter Eggs Ever, Easter Bunny's On His Way, The*

But the unchallenged record demonstrates the school permitted Wesley, in the classroom and as part of his "All About Me" week, to express his religious beliefs. These beliefs were featured on his "All About Me" poster as a depiction of a church and a statement expressing that he likes to attend church. Wesley was permitted, as other students were, to present his poster to the class in the manner he desired. Accordingly, the school's actions do not appear to have been motivated by discrimination against Wesley's religion. Rather, the school identified a significant difference between the identification of religious belief and certain holiday-oriented religious materials, on the one hand, and a parent's reading of holy scripture, on the other hand, which it considered a form of proselytizing.

It may be reasonably argued that a mother's reading of the Bible to a kindergarten class, especially sublime verses from the Book of Psalms, should be permitted. In this sense and for many, the conduct is benign and the message inspiring. But a reading from the Bible or other religious text is more than a message and unquestionably conveys a strong sense of spiritual and moral authority. In this case, the audience is involuntary and very young. Parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult's reading of religious texts.

The dilemma here is that our jurisprudence seeks to affirm the right of individuals to identify and practice their religion and at the same time to forestall the establishment of religion. In this case, as in many

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Night Before Easter, Hooray for Hanukkah, The Magic Dreidels, and *The Hanukkah Mice.*

others, these fundamental principles are in tension with one another. Often a vehicle of religious practice, speech is sometimes undertaken in private, sometimes in a group, and sometimes, as here, in a public school. The public school setting may implicate the Establishment Clause, especially where public authority undertakes or is reasonably perceived to have undertaken to give one religious belief official approval or approval over other religious beliefs. And this tension is particularly vexing in a public school where attendance is compulsory and moral and social values are being developed along with basic learning skills. In seeking to address that tension, elementary school administrators and teachers should be given latitude within a range of reasonableness related to preserving the school's educational goals. *See Hazelwood Sch. Dist.*, 484 U.S. at 273; *Walz*, 342 F.3d at 277-78, 280-81. In this case, the school's actions were not unreasonable.[11]

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[11] Busch averred additional claims on equal protection grounds. She contends the school's disparate treatment of her and Lipski interfered with her and Wesley's fundamental right to free speech. Because we conclude the school's actions did not unconstitutionally burden Busch or Wesley's First Amendment rights, rational basis review is appropriate. *See Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test."); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) ("[R]ational basis review is appropriate unless the restriction unconstitutionally burdens a fundamental right, here, the right to free speech. Because we conclude that the restrictions do not unconstitutionally burden Rubin's right of free speech, we find that neither do they violate his Equal Protection right."). Accor-

III

Busch also challenges the school's actions on establishment grounds. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government conduct complies with the Establishment Clause if it meets three criteria. First, it must have a secular purpose. *Id.* at 612. Second, its primary or principal effect can neither advance nor inhibit religion, meaning that regardless of its purpose, the action cannot symbolically endorse or disapprove of religion. *See id.; ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1485-86 (3d Cir. 1996) (en banc). Third, the government action cannot foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 613; *ACLU*, 84 F.3d at 1483.

Regarding the first of these criteria, Principal Cook prohibited Busch's reading because he said it would be "against the law . . . of separation of church and state." Complying with the Establishment Clause jurisprudence is a secular purpose. And given the history of Establishment Clause violations when religious messages have been conveyed at school-sponsored activities, *see, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation ceremony), Cook's determination that a biblical reading to kindergarten students during a curricular activity might also violate the Establishment Clause is not unreasonable.

The likelihood of an Establishment Clause violation is relevant to the second *Lemon* prong as well. An objective observer would recognize the challenges

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dingly, because the school's action was in furtherance of a legitimate pedagogical objective, we affirm the District Court's holding that no equal protection violation occurred.

educators face when confronting potential Establishment Clause violations. *See, e.g., Santa Fe Indep. Sch. Dist.,* 530 U.S. at 308 (focusing the analysis on an objective observer familiar with the situation confronting the school). Principal Cook's efforts were reasonably oriented toward complying with the Constitution, and accordingly, an observer would not recognize his actions to be hostile toward Wesley and Busch's faith. An objective observer would also know of Wesley's own participation in the "All About Me" week. These events do not demonstrate hostility to Wesley's identification with his faith.

Finally, Busch suggests the school's policy governing religious content in the classroom requires educators to make ad hoc judgments, creating an excessive entanglement with religion: "Defendants do not have a coherent policy governing parental participation in classroom activities or religious expression. Instead, judgments about what is permissible and what is not permissible are made on an *ad hoc* basis, with Defendants scrutinizing the speech at issue and making an uninformed judgment call as to whether the speech is too religious. This creates excessive entanglement between government and religion." Br. of Appellant at 15. The school district, however, has a policy permitting holiday-oriented content and cultural themes but disallowing speech that promotes religion. The school's monitoring of materials presented in elementary classrooms for the purpose of complying with its policy and the Establishment Clause does not render the government's actions excessively entangled with religion. *See Bowen v. Kendrick,* 487 U.S. 589, 615-17 (1988) (finding the review of educational materials to ensure compliance with statutory and constitutional requirements does not create an excessive entanglement with religion).

Accordingly, the school's actions do not violate the Establishment Clause because they were motivated by a permissible purpose to comply with the Establishment Clause; they do not evidence hostility toward Wesley's faith; and they are not excessively entangled with religion.

IV

For the foregoing reasons, we will affirm the judgment of the District Court.

BARRY, Circuit Judge, *concurring.*

We have observed that "at a certain point, a school child is so young that it might reasonably be presumed" that the First Amendment does not protect that child's speech. *Walker-Serrano by Walker v. Leonard,* 325 F.3d 412, 417 (3d Cir. 2003). We have also observed that "[w]here that point falls is subject to reasonable debate." *Id.*

It cannot seriously be a subject of reasonable debate that "that point" is kindergarten. I say this not because Wesley, then age five, could neither read nor write and not because I take issue with his mother's claim that the Bible is Wesley's favorite book and not because, at least in my view, Wesley and his kindergarten classmates would have been unable to understand the excerpts from Psalm 118 that his mother sought to read on his behalf, excerpts which tell us what Israel and the House of Aaron say about the Lord's mercy and note the concept of salvation, a concept I note has been the subject of discussion and debate among biblical scholars for centuries. I say that "that point" is kindergarten because children of kindergarten age are simply too young and the responsibilities of their teachers too special to elevate to a constitutional dispute cognizable in federal court

any disagreement over what a child can and cannot say and can and cannot do and what a classmate can and cannot be subjected to by that child or his or her champion.

We send our littlest ones off to school worrying about them and hoping no harm will come to them, but confident in the knowledge that they will be protected and guided and, yes, nurtured by their teachers, who are our surrogates while our children are away. And so I write because I find something unsettling about this case and others like it which, while recognizing the crucial importance of age in determining the extent of the First Amendment's protections, have not—at least, not yet—carved out an exception for the little ones but, rather, continue to scrutinize and analyze purported violations of the First Amendment rights of children at the pre-K and kindergarten levels. I nonetheless join Chief Judge Scirica's excellent Opinion because it correctly applies our precedent to the issues before us. Perhaps our next case will tweak that precedent just slightly to accommodate my concerns.

HARDIMAN, Circuit Judge, *dissenting in part and concurring in part.*

The Supreme Court has consistently considered two important questions in Free Speech Clause cases involving private speech: (1) whether the state's regulation of speech is based on subject matter or viewpoint; and (2) whether the speech being regulated takes place in a public forum, a limited public forum, or a nonpublic forum. The majority does not discuss the first question. As for the second question, the majority summarily concludes that this classroom was a nonpublic forum. After doing so, the majority relies extensively on *Walz v. Egg Harbor Township*

Board of Education, 342 F.3d 271 (3d Cir. 2003), in concluding that the School District appropriately barred Donna Busch from speaking. Because I do not believe *Walz* controls this appeal, I must respectfully dissent from that portion of the majority's opinion that relates to Busch's free speech claim.[12]

I.

Under the First Amendment, content-based regulations of speech are presumptively invalid. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). This presumption covers two types of content-based regulations: (1) prohibitions of public discussion of an entire topic or subject matter; and (2) restrictions on particular viewpoints. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n,* 447 U.S. 530, 537 (1980). Accordingly, a content-neutral regulation "places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed." *Hill v. Colorado,* 530 U.S. 703, 723 (2000).

The distinction between subject-matter and viewpoint discrimination is not a bright one. *Cogswell v. City of Seattle,* 347 F.3d 809, 815 (9th Cir. 2003). As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 96 (1972). Therefore, governmental action that regulates speech on the basis of its subject matter "slip[s] from the neutrality of time, place, and cir-

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[12] I concur with the majority's holding in Part III of its opinion denying Busch relief on her Establishment Clause claim. However, I disagree with the majority's implication in that Part that the School District's desire to avoid an Establishment Clause violation was a valid concern. *See infra* note 5.

cumstance into a concern about content." *Id.* at 99. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating." *Consol. Edison,* 447 U.S. at 537-38; *Startzell v. City of Phila.,* 533 F.3d 183, 192-93 (3d Cir. 2008). "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 515 (1981).

By contrast, viewpoint discrimination occurs when the government targets not just subject matter, but also particular views taken by speakers on a subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995). Viewpoint discrimination is "an egregious form of content discrimination" and "the violation of the First Amendment is all the more blatant." *Id.* "To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514, 527 (3d Cir. 2004). As Justice Brennan explained in his dissent in *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), "[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Id.* at 62.

The Supreme Court has consistently held that discrimination based on the religious character of speech is properly classified as viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), the Court held that a school district could not permit school property

to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious perspective. *Id.* at 393. Similarly, in *Rosenberger,* the Court held unconstitutional a university's refusal to fund a student publication because it addressed issues from a religious perspective. 515 U.S. at 831. The Court explained: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* Finally, in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), the Court found viewpoint discrimination where a public school permitted nonreligious groups to meet on school property after school but prohibited a Christian club from doing so. *Id.* at 107-09. The Court held that exclusion of a religious group amounted to impermissible viewpoint discrimination where the group sought only "to address a subject otherwise permitted under the [school district's policy], the teaching of morals and character, from a religious standpoint." *Id.* at 109. Together, *Lamb's Chapel, Rosenberger,* and *Good News Club* stand for the proposition that if the government permits the discussion of a topic from a secular perspective, "it may not shut out speech that discusses that same topic from a religious perspective." *Stafford,* 386 F.3d at 528.

Comparing the facts of *Walz* and the present case, I find they fall on opposite sides of the subject-matter /viewpoint divide. In *Walz,* this Court considered whether a school's refusal to allow a first-grade student to distribute pencils that included the phrase "Jesus [Loves] The Little Children" and candy canes with attached religious stories during a classroom holiday party violated the student's constitutional

rights. 342 F.3d at 274. The school maintained an unwritten policy forbidding religious, as well as political and commercial messages, but noted that religion may be acknowledged "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday." *Id.* at 273. As the district court in *Walz* determined, the regulation at issue was viewpoint neutral, although it limited some religious speech. *Walz v. Egg Harbor Twp. Bd. of Educ.*, 187 F. Supp. 2d 232, 239-40 (D.N.J. 2002). Citing *Lamb's Chapel,* the student argued that because the restriction addressed religious speech specifically, it was not viewpoint neutral. The district court disagreed. The court acknowledged the Supreme Court's warning that discrimination against religion in general may constitute viewpoint discrimination because it prevents discussion from a religious standpoint. However, the court found *Lamb's Chapel* and its progeny inapplicable because the school had not opened a forum for the exchange of views about a subject by hosting a holiday party. *Id.* at 239. Rather, the school had only solicited generic gifts devoid of any message and had not created a forum to promote *any* viewpoint, religious *or* secular. *Id.* Therefore, the district court properly concluded that the regulation was viewpoint neutral, even if it discriminated on the basis of subject matter.

In contrast to the district court's careful analysis of the distinction between subject matter and viewpoint discrimination in *Walz,* this Court declined to engage in such an inquiry on appeal, concluding that "in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message." *Walz,* 342 F.3d at 278. Without determining whether the discrimination was

based on subject matter or viewpoint, we held that the school could bar the student from "promot[ing] a religious message through the channel of a benign classroom activity." *Id.* at 280.

The regulation at issue in this appeal is different from that in *Walz.* As the District Court noted, this case involves viewpoint discrimination. *Busch v. Marple Newtown Sch. Dist.,* No. 05-CV-2094, 2007 WL 1589507, at *7 (E.D. Pa. May 31, 2007). The teacher's description of "All About Me" week left the subject matter of the assignment open-ended, stating: "Each child will have the opportunity to share information about themselves [sic] during their 'All About Me' week." Furthermore, the description encouraged discussion of the "child's family, hobbies, and interests," and invited parents to "come to school to share a talent, short game, small craft, or story" during their child's week. Accordingly, Donna Busch's attempt to read Psalm 118 to her son's class fell within the specified subject matter *i.e.,* something of interest to her son and important to his family and the sole reason for excluding her speech was its religious character. Psalm 118 does not contain vulgar or lewd language, *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 685 (1985) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission."), nor does it praise illegal activities, *Morse v. Frederick,* 127 S. Ct. 2618, 2629 (2007) (school was justified in restricting speech that could be "reasonably viewed as promoting illegal drug use"), and there is no evidence that Busch's reading would have caused any sort of classroom disruption, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 513 (1969).

Instead, the challenged speech was responsive to the assignment but approached it from a religious perspective because religion is most important to the Busch family. As the Supreme Court has observed, particularly in the context of religious expression, it can be difficult to discern what amounts to a subject matter unto itself, and what, by contrast, is best characterized as a standpoint from which a subject matter is approached. *See Rosenberger,* 515 U.S. at 831. However, I believe the school went too far in this case in limiting participation in "All About Me" week to nonreligious perspectives. As the District Court properly noted, Donna Busch was denied the opportunity to read the story her son chose because it expressed a *religious viewpoint,* rather than a secular one. This plainly constituted viewpoint, not subject matter, discrimination.[13] As then-Judge Alito recognized in his dissent in *C.H. v. Oliva,* 226 F.3d 198 (3d Cir. 2000) (en banc), such viewpoint discrimination is proscribed by the First Amendment unless the School District can show that allowing Busch's speech on a nondiscriminatory basis would have "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of other [.] [students]." *Id.* at 212 (quoting

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[13] As Busch argues, that this was viewpoint discrimination is made manifest by the fact that religious discussion had not been foreign to this classroom in the past. Apart from "All About Me" week activities, a different parent twice was invited to present to the class about Hanukkah and Passover. Therefore, in addition to having discriminated against the religious perspective *generally*—in contravention of *Lamb's Chapel, Rosenberger,* and *Good News*—the School District may have improperly discriminated *between* religious perspectives. Either way, the School District does not vigorously challenge the District Court's conclusion that its restriction of Busch's speech was viewpoint-based.

Tinker, 393 U.S. at 513). "When the government makes an avenue of communication available to the proponents of some views, the same opportunity must, absent exceptional circumstances, be afforded to others who wish to express their ideas in that manner, whether or not the governmental officials endorse or sanction the thoughts to be expressed." *Main Road v. Aytch,* 522 F.2d 1080, 1087 (3d Cir. 1975).

The viewpoint discrimination visited upon Busch differs from the treatment in *Walz.* Though we did not explicitly address the subject matter/viewpoint distinction in *Walz,* the district court's thorough analysis in that case shows that the regulation was viewpoint neutral; the school did not open the forum to discuss *any* subjects. By contrast, here the School District solicited speech, but then discriminated on the basis of viewpoint by refusing to allow Donna Busch to express herself from a religious perspective. Having opened the proverbial Pandora's box by inviting parents of kindergarten students to speak to the class about their children's "family, hobbies, and interests," the School District was required to respect the boundaries that it had set—however open-ended—provided that the speech remained germane to the subject matter and subject, of course, to the limitations set forth in *Tinker, Fraser,* and *Morse.* Because the basis of discrimination differs between the two cases, I do not find *Walz* controlling.[14]

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[14] I also depart from the majority's brief forum analysis in Part I.A of its opinion. As the Supreme Court noted in *Perry,* "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." 460 U.S. at 44. Accordingly, the Supreme Court "has adopted a forum analysis as a means of determining when the

The majority's adherence to *Walz* is, in my view, also flawed because of that case's reliance on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260

Government's interest in limiting the use of its property to the intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

The District Court found that the teacher's invitation converted the classroom into at most a limited public forum, which is created when the state opens a public place for expressive activity. *Perry*, 460 U.S. at 45. The District Court accurately noted that the School District "opened [the] classroom to specific people, the parents of [the] students, for a specific delineated purpose," to participate in the discussion of their children via "All About Me" week. *Busch*, 2007 WL 1589507, at *6. While the First Amendment "does not guarantee access to property simply because it is owned or controlled by the government," *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981), when the state has opened a forum but limits the expressive activity to certain kinds of speakers or the discussion of certain subjects as the School District did here—"[t]he Constitution forbids a state to enforce certain exclusions . . . even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45. Although the School District surely was not required to invite parents into the classroom in the first place, once it did so, it could only apply reasonable time, place, and manner regulations; content-based prohibitions "must be narrowly drawn to effectuate a compelling state interest." *Id.* at 46.

The majority summarily concludes that the classroom is a nonpublic forum. Even assuming this to be the case, the government could not restrict speech on the basis of the speaker's viewpoint. *Id.* at 45; *see also Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral.")* (emphasis added); *Child Evangelism Fellowship*, 386 F.3 d at 524 ("[E]ven if the. . . fora were not limited public fora but were closed, [the school] still could not engage in viewpoint discrimination.").

(1988). In *Hazelwood,* the Supreme Court upheld a principal's deletion of student articles on teen pregnancy and divorce from a school-sponsored newspaper. The Court held that the school could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities as long as [its] actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Hazelwood is limited to situations in which the speech may be interpreted as coming from the school itself. As the Supreme Court acknowledged:

> The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . Educators are entitled to exercise greater control over this second form of student expression.

Id. at 271.

The Court reaffirmed this principle in *Rosenberger,* explaining:

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have per-

> mitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . It does not follow, however . . . that viewpoint-based restrictions are proper when the University does not itself speak . . . but instead encourage[s] a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

515 U.S. at 833-34. *See also Pleasant Grove City v. Summum,* 129 S. Ct. 1125, 1131-34 (2009) (noting distinction between government speech and private speech).

I find *Hazelwood* inapposite to this appeal because there is no risk that Busch's speech would "bear the imprimatur of the school," *Hazelwood,* 484 U.S. at 271, nor will it be mistaken for "the [school's] own speech." *Rosenberger,* 515 U.S. at 834. Here, "All About Me" week was designed to help students "identify individual interests and learn about others." The teacher explained to parents that "[e]ach child will have the opportunity to share information about themselves [sic] during their 'All About Me' week." Students were invited to send in a poster with pictures of their favorite things, bring in special toys or snacks to share with the class, and parents were welcome to "come to school to share a talent, short game, small craft, or story." Everything from the title of the exercise—"All About *Me*" week—to the specific requests made by the teacher, indicated that the student (or, in reality, the parent) was speaking and not

the school.[15] This is distinguishable from the situation in *Hazelwood,* which contained numerous indicia of school-sponsorship, including: the newspaper was produced by students in a journalism class that was part of the school curriculum; the school financed the paper and it was the official school newspaper; the students' work was reviewed and graded by a faculty member and the entire paper was subject to the review of the principal prior to publication. *See Hazelwood,* 484 U.S. at 268-69.

As *Walz* itself indicates, "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment would appear to be protected." 342 F.3d at 279. "[N]othing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her *personal* views in class or in an assignment." *Oliva,* 226 F.3d at 213 (Alito, J., dissenting) (emphasis added). Donna Busch's speech came in response to the teacher's broad invitation to share something about her child; once invited, the School District was obliged to "tolerate" her speech, not to "affirmatively promote" it. *Hazelwood,* 484 U.S. at 271. "School- or government-sponsored speech occurs when a public school or other governmental entity aims 'to convey its own message.'" *Child Evangelism Fellowship,* 386 F.3d at 524 (quoting *Rosenberger,* 515 U.S. at 833). By contrast, when the school solicits the expression of "a diversity of views from private speakers," the expression that results is private. *Id.*

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[15] The likelihood that a kindergarten student would engage this assignment without parental influence and control is exceedingly remote. And the various approaches that a parent might take in this regard are as idiosyncratic as the number of parents.

In *Walz*, this Court seemed concerned that young students would not be able to distinguish between school-sponsored speech and speech from private individuals, and "the school may wish to avoid the appearance of endorsing certain speech." 342 F.3d at 277. Accordingly, we set forth a number of factors against which to measure the propriety of student expression in an elementary school setting, including: the type of speech; the age of the speaker and audience; the school's control over the activity in which the expression occurs; and whether the school solicits individual views from students during the activity. *Id.* at 278.

The *Walz* factors strike me as highly manipulable and therefore may encompass speech—such as the expression at issue in this case—that will not be reasonably perceived as school-sponsored. Even kindergarten students are capable of distinguishing between personal "show and tell" activities and school-sponsored instruction. As we observed in *Walz:*

> The appropriateness of student speech must be viewed in its educational context. For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing *himself* in the context of a school assignment or activity *where the school has sought students' personal views.*

342 F.3d at 278 (emphasis added).

The speech at issue in this appeal closely resembles a "show and tell" exercise. Accordingly, Donna Busch's speech did not "bear the imprimatur of the school" and *Hazelwood* is inapposite.[16]

III.

Finally, I note that even if we were to find that *Hazelwood* should control this case because any speech to young children is likely to be perceived as being school-sponsored, this would not conclude our inquiry. In holding that a school may regulate school-sponsored expressive activities so long as the regulation is "reasonably related to legitimate pedagogical concerns," the *Hazelwood* Court justified the principal's decision to discriminate on the basis of *content;* but that decision does not necessarily offer any justification for allowing educators to discriminate based on *viewpoint* absent a compelling government interest.

As the Supreme Court held in *Hazelwood,* "educators do not offend the First Amendment by exercising editorial control over the *style* and *content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legiti-

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[16] Because I find that the speech in question could not have borne the imprimatur of the School District, I also reject the District Court's conclusion that the School District's viewpoint discrimination was necessary to avoid an Establishment Clause violation. "The Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion." *Oliva,* 225 F.3d at 211 (Alito, *J.*, dissenting) (citing *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 763-70 (1995) (plurality)). Because the speech came from Busch and cannot be considered school-sponsored, it did not violate the Establishment Clause.

mate pedagogical concerns." 484 U.S. at 273 (emphasis added). The school officials in that case conceded that any restrictions on school-sponsored student speech must be viewpoint neutral. *Id.* at 287 n.3 (Brennan, J., concurring). More fundamentally, if schools could impose viewpoint-based restrictions on all student speech that might be perceived as school-sponsored, the promise of *Tinker*—that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"—would mean very little. *Tinker,* 393 U.S. at 506.

Because *Hazelwood* did not address the issue of viewpoint discrimination, the question of whether school-sponsored speech can discriminate on the basis of viewpoint remains open and our sister courts of appeals are split on this issue. Some circuits have found that *Hazelwood* requires that the school's regulation only be reasonably related to pedagogical concerns. *See Fleming v. Jefferson County Sch. Dist.,* 298 F.3d 918, 926-29 (10th Cir. 2002); *Ward v. Hickey,* 996 F.2d 448, 454 (1st Cir. 1993); *see also C.H. ex rel. Z.H. v. Oliva,* 195 F.3d 167, 172-73 (3d Cir. 1999), *vacated and reh'g en banc ("Hazelwood* clearly stands for the proposition that educators may impose *non-viewpoint neutral* restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns.") (emphasis added). In essence, these courts read *Hazelwood* as establishing a rational basis standard for speech in the public school setting. The District Court embraced this standard, holding that "schools may restrict speech *even based on its viewpoint* `so long as their actions are reasonably related to legitimate pedagogical concerns.'" *Busch,* 2007 WL 1589507, at *9 (emphasis added).

By contrast, other circuit courts of appeals have interpreted the *Hazelwood* standard to require that a school's restriction be not only reasonable, but also viewpoint neutral. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626, 629-30 (2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991); *Searcey v. Harris*, 888 F.2d 1314, 1320 (11th Cir. 1989); *see also Oliva*, 226 F.3d at 211 (Alito, J., dissenting). Citing these cases, Busch argues that when a public school opens a limited public forum, the general rule prohibiting viewpoint-based restrictions remains effective despite *Hazelwood*.

Without explicitly embracing either of these two perspectives vis-à-vis viewpoint discrimination, we concluded in *Walz* that "in the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." 342 F.3d at 280 (citing *Hazelwood*, 484 U.S. at 273). Given the school's valid educational purposes, this Court reasoned, its actions were appropriate. *Id.* The Court did not explain its level of scrutiny, however. Likewise, in the present case, the majority makes sparse mention of *Hazelwood* and does not attempt to justify the school's viewpoint discrimination under either rational basis review or strict scrutiny.[17]

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[17] Neither the *Walz* court nor the majority here would have had occasion to clarify whether *Hazelwood* disallowed viewpoint discrimination, because, as noted above, neither opinion addressed the question whether the discrimination was based on subject matter or viewpoint in the first place.

If we wish to conclude that *Hazelwood* grants schools the power to discriminate on the basis of viewpoint, I think we should do so explicitly. This Court's approach in *Walz* and in this appeal, however pragmatic or commonsensical, lends itself to ad hoc jurisprudence. I recommend that we establish clear rules regarding viewpoint discrimination in the classroom. "The need for specificity is especially important where, as here, the regulation at issue is a 'content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.'" *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (quoting *Reno v. ACLU*, 521 U.S. 844, 871- 72 (1997)); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'") (citation omitted).

IV.

Clearly, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682. It does not follow, however, that the state may regulate one's viewpoint merely because speech occurs in a schoolhouse—especially when the facts of the case demonstrate that the speech is personal to the student and/or his parent rather than the school's speech. The majority's desire to protect young children from potentially influential speech in the classroom is understandable. But that goal, however admirable, does not allow the government to offer a student and his parents the opportunity to express something

about themselves, except what is most important to them. With respect, I dissent.[18]

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[18] I agree largely with the sentiments Judge Barry expresses in her concurrence. Like Justice Thomas's recent concurring opinion in *Morse,* Judge Barry harkens back to a day when American schools were run by principals and teachers, acting *in loco parentis,* with little or no intrusion from lawyers, courts, and parents. *See Morse,* 127 S. Ct. at 2630-36 (Thomas, J., concurring). But this is not where we find ourselves today. As long as our schools continue to provide a forum for *some* parents and teachers to espouse their views in public schools, we must manage the speech of *all* parents and teachers within the guise of the First Amendment, lest we engage in the very sort of viewpoint discrimination that the Amendment was designed to protect against.

An "elementary school exception" or "kindergarten exception" to the First Amendment seems sensible to me. However, instead of establishing such an exception—which would delegate to schools the power to determine what is said and done in the classroom the majority opinion merely allows *this* school to prohibit a viewpoint, germane to the assignment, that it disfavors. In addition, I question whether the creation of such an exception should be the exclusive province of the Supreme Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 05-CV-2094

DONNA KAY BUSCH, in her individual capacity and as the parent and next friend of Wesley Busch, a minor,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*

SURRICK, J. MAY 31, 2007

MEMORANDUM & ORDER

Presently before the Court are Plaintiff Donna Kay Busch's Motion For Partial Summary Judgment (Doc. No. 20) and Defendants Marple Newtown School District, Marple Newtown School District Board of Directors, Robert Mesaros, and Thomas Cook's Cross-Motion For Summary Judgment (Doc. No. 19). For the following reasons, Defendants' Motion will be granted and Plaintiff's Motion will be denied.

I. BACKGROUND

Donna Kay Busch (hereinafter "Plaintiff") is the mother of Wesley Busch (hereinafter "Wesley"), a student at the Culbertson Elementary School ("Culbertson"), a division of the Marple Newtown School District. (Doc. No. 1 ¶ 2.1.) In October 2004, Wesley was in the kindergarten class at Culbertson,

taught by Jaime Reilly. (*Id.* ¶ 3.2; Doc. No. 20 at 4.) As part of her kindergarten social studies curriculum, Reilly included a unit of study called "All About Me." (Doc. No. 20 at 3; Doc. No. 19 at 7.) The unit was designed to be a "socialization" program in which students would "identify individual interests and learn about others" and would "identify sources of conflict with others and ways that conflicts can be resolved." (Kindergarten Social Studies Curriculum, Doc. No. 20 at Ex. B.) Reilly implemented this unit of study by featuring a different child each week. (Doc. No. 20 at 4.) During that week, the children were given the opportunity to "share information about themselves" by bringing in a "poster with pictures, drawings or magazine cut outs of [their] family, hobbies, or interests." ("All About Me" Handout, Doc. No. 20 at Ex. I.) The children were also asked to bring in a special toy or stuffed animal to introduce to the class and were permitted to bring a snack to share with the class. (*Id.*) Finally, Reilly invited parents to participate in the unit by coming to school to "share a talent, short game, small craft, or story" with the class. (*Id.*) Reilly asked that parents contact her one week in advance to schedule a day and time for their presentations.[1] (*Id.*)

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[1] There appears to be a dispute regarding how Plaintiff received information about this unit of study. Reilly attests that she gave the handout to parents during Back-to-School Night and subsequently gave the handout to Plaintiff, who had not attended that night. (Reilly Aff. at 1.) Plaintiff indicated that it was possible that she had received some paperwork on the unit and that she stopped by the school slightly more than one week before Wesley's "All About Me" week to discuss what she should do with Reilly. (Busch Dep. at 39, 60-61.) Plaintiff attests that Reilly then told her she could do "a favorite book . . . a dessert

Wesley responded to the "All About Me" week assignment in several ways. He and his mother together made a poster to bring to the class that was then displayed in the classroom during his week. (Doc. No. 19 at 15.) Plaintiff let Wesley choose what to place on his poster; he chose photographs of himself with his hamster, his brothers, and his parents, a picture of a church cut out from construction paper, and a photograph of his best friend at the time. (Busch Dep. at 74.) Plaintiff indicated that underneath the picture of the church, Wesley asked her to write several words: "'I love to go to the House of the Lord' or 'I like to go to church' or something like that." (Busch Dep. at 79.) Plaintiff saw the poster hanging in the classroom when she came in during Wesley's "All About Me" week. (*Id.* at 81.) Like the other children in the class, Wesley was given the opportunity to present his poster to the class and explain the various items on it. (Reilly Dep. at 62.)

In addition to this poster, Wesley's mother also came to Culbertson to do a presentation during his "All About Me" week. On October 15, 2004, Plaintiff came to Wesley's class to participate in his "All About Me" week by reading to the class. (Doc. No. 19

. . . just the different things on this paper [the "All About Me" handout]." (*Id.* at 61.) Reilly testified that she had no recollection of this meeting with Plaintiff. (Reilly Dep. at 176.) Defendants point out that while Busch regularly signed in for visits to the school, there is no record of her signing in during the month of October 2004 prior to Wesley's "All About Me" week. (Doc. No. 19 at 14; *id.* at Ex. 7.) While there is some dispute about how Plaintiff learned the details of the "All About Me" week invitation, these facts are not material to the disposition of the instant motions.

at Ex. 7.) In preparing for this presentation, Plaintiff told Wesley that the teacher indicated that she could come in and read his favorite book and asked what he would like her to read. (Busch Dep. at 37.) Wesley responded, "the Bible."[2] (*Id.*) Plaintiff describes herself as an Evangelical Christian. (Eric Busch Dep. at 41.) Her husband described an Evangelical as "one who brings God's word to the world." (*Id.*) Plaintiff testified that an Evangelical Christian is "someone who believes . . . the bible is the literal word of God." (Busch Dep. at 263.) Busch and Wesley routinely read the Bible together at breakfast and before going to bed. (*Id.* at 94.) Wesley often carried the Bible with him and frequently asked his mother to read to him from the Bible. (*Id.* at 93.)

The night before her visit, Plaintiff chose Psalm 118 from the Bible and decided to read verses 1 through 4 and verse 14. (*Id.* at 110, 114.) The King James Bible, from which Plaintiff planned to read (Busch Dep. at 226), translates those verses as follows:

> 1 Give thanks unto the Lord, for he is good; because his mercy endures forever.
>
> 2 Let Israel now say, his mercy endures forever.
>
> 3 Let the house of Aaron now say, that his mercy endures forever.

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[2] Defendants note that Wesley's babysitter, Judy Harper, testified that Wesley's favorite book in kindergarten was "Brown Bear, Brown Bear." (Doc. No. 19 at 16-17; Harper Dep. at 12.) Defendants contend that the Bible is really Plaintiff's favorite book. (Doc. No. 19 at 17; Busch Dep. at 95.)

> 4 Let them now that fear the Lord say,[3] that his mercy endures forever.
>
> * * *
>
> 14 The Lord is my strength and my song, and is become my salvation.

(Doc. No. 20 at 7 citing Psalms 118:1-4, 14 (King James).) Plaintiff chose verses from Psalms not only because she and Wesley frequently read from the Book of Psalms, but because she thought the children in class would like Psalms since they are similar to poetry, and because she wanted a reading that did not make any reference to Jesus, which she feared might upset some people.[4] (Busch Dep. at 111-13.)

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[3] Plaintiff's brief translates the first part of verse 4 as "Let them now hear the Lord say." (Doc. No. 20 at 7.) We assume this to be a typographical error as the King James version translates the phrase as "Let them now that fear the Lord say . . ."

[4] Defendants suggest that Plaintiff's choice of Psalm 118 was not so mundane as she intimates. Defendants cite to the expert witness report of Brian Ortale, who describes Psalm 118 as "a powerful tool for proselytizing by the Christian community." (Doc. No. 19 at Ex. 41, p. 4.) Ortale suggests that the Christian view of verse 22 ("the stone which the builders refused is become the head stone of the corner") is that "Jesus is the stone rejected by some but exalted by God." (*Id.*) As a result, verse 14 ("The Lord is my strength and my song, and is become my salvation") is a reference to Jesus who is viewed as the Lord and the source of salvation. (*Id.*) Ortale also offers the opinion that Evangelical Christians believe the following:

> [T]he work of the word is accomplished through the power of the word itself. . . . God, as it were, uses the Evangelical Christian missionary as a mouthpiece to speak the word but the power of the word is the power of God. . . . An Evangelical Christian believes the reading of the psalm conveys a blessing upon the one who comes in the name of

Plaintiff testified that she intended to read the verses without explanation and that if asked, she would respond that "it was ancient psalms and ancient poetry and one of Wesley's favorite things to hear and hopefully that would be the end of it and I could scoot out."[5] (*Id.* at 115.)

On the morning of October 15, 2004, Plaintiff accompanied her son to school. (Busch Dep. at 122.) She entered Wesley's classroom and informed Reilly that she was prepared to read to the class from Psalm 118. (*Id.* at 126-27.) Reilly responded that she would have to check with the principal, Thomas Cook. (*Id.* at 128.) Reilly then spoke to Principal Cook in the hallway (*id.* at 131) and when she returned, told Plaintiff that Principal Cook wanted to speak with Busch in the hallway (*id.* at 135). Once alone,

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> the Lord. . . . The reading of Psalm 118 conveys the power of the word of God upon the reader, and the reader receives a blessing for it. This makes the reading of Psalm 118 a religious exercise for an Evangelical Christian.

(*Id.* at Ex. 41, p. 7-8.) Plaintiff does not comment on this opinion and its explanation of Psalm 118. Clearly, there is some dispute as to the intention behind Plaintiff's desire to read Psalm 118 to Wesley's class. However, as we will discuss hereinafter, our legal conclusions are not dependent on an assessment of Plaintiff's subjective intent but rather derive from a consideration of the context as a whole.

[5] Plaintiff also testified that she gave some consideration to the fact that the children to whom she was reading might ask questions involving religious belief. (Busch Dep. at 264-65.) When asked what she would do if that occurred, Plaintiff responded: "You know, my intent was to just get in and read and leave. Had they asked any questions, I didn't – I don't know what I would have done. I probably would have, you know, maybe asked – just told them that it was just – I don't know what I would have done." (*Id.* at 265.)

Cook told Busch that reading the Bible to the class would be "against the law . . . of separation of church and state" (Busch Dep. at 139-40) and asked her to read from another book (Cook Dep. at 102). Cook determined that it was improper to read from the Bible to a class of kindergarten students because he felt that the "Bible is holy scripture. . . . [I]t's the word of God. And . . . reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view."[6] (Cook Dep. at 105-06.) Busch responded that her other son had just finished reading a book called *Gershon's Monster: A Story for the Jewish New Year* that he had taken from the school library and suggested that it was "the same thing that [she] was going to read." (Busch Dep. at 140.) Principal Cook responded: "Well, that's cultural and your son chose that book and these children are not choosing to hear from the Bible. . . . I can't let you do it."[7] (*Id.*) As a

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[6] Robert Mesaros, then Superintendent of the School District, supported Cook's response to Busch for the following reasons:

> In policy 220 it indicates that a student cannot – is not permitted to advocate a religious point of view or preference, and certainly a teacher is not permitted to read from the Bible to the students, and in this case the parent would be taking the place of the teacher in front of a group of students who are there because they must be there by state law, and they would be – a captive audience, and they would have no choice but to listen to Mrs. Busch . . . read the Bible if so permitted, and therefore it was assumed that the school district and the school was advocating or supporting the – whatever was going to be read by, in this case, Mrs. Busch.

(Mesaros Dep. at 158.)

[7] Plaintiff's Counsel, as part of his deposition questioning on the distinction between cultural and religious expression, asked

result of this conversation, Busch returned to the classroom and asked Reilly for a different book to read to the class. (*Id.* at 153.) Reilly offered Plaintiff a book about witches and Halloween, which Plaintiff declined,[8] and they settled on a book on counting. (*Id.* at 157-58.)

During Cook's conversation in the hallway with Busch, the door remained open. (Reilly Dep. at 183.) Reilly spent that time taking attendance and gathering notes from the children. (*Id.* at 182.) She could not hear any of the conversation between Busch and Cook. (*Id.* at 183.) Reilly never spoke with Wesley about the incident nor did she notice any change in his behavior or demeanor that day. (*Id.* at 183-84.)

Like Plaintiff, many other parents participated in the "All About Me" unit by coming to the class to read stories, share snacks, or do crafts. (Doc. No. 19 at Exs. 6, 7.) Among the stories that parents read

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Principal Cook and Ms. Reilly many questions that sought their opinions on proposed hypothetical situations. In particular, counsel asked questions comparing a presentation on the menorah to one about "the history of the cross and Jesus carrying the cross." (*See, e.g.*, Cook Dep. at 92.) Principal Cook drew a distinction between cultural symbols and religious expression (*see, e.g., id.* at 107-17) while Reilly explained that she could not answer the question without guessing because "that's not what happened in this situation." (Reilly Dep. at 101-02.) As will be discussed *infra*, we cannot make legal findings based on Defendants' opinions offered in response to purely hypothetical scenarios. As a result, we use this deposition testimony only to illuminate the actual circumstances before us.

[8] Busch did not recall the title of the book but did not want to read it because she did not believe in the subject matter of the book. (Busch Dep. at 158.)

were: *The Grinch Who Stole Christmas*, *The Jolly Roger*, and *Green Eggs and Ham*. (*Id.* at Ex. 7.) Reilly also keeps a library of books in her classroom from which she reads. Among the books she read to Wesley's class, there are a number of books about Christmas, Easter, and Hanukkah including: *Bear Stays Up for Christmas*, *Froggy's Best Christmas*, *The Wild Christmas*, *Ten Timid Ghosts on a Christmas Night*, *Christmas Trolls*, *The Best Easter Eggs Ever*, *Easter Bunny's On His Way*, *The Night Before Easter*, *Hooray for Hanukkah*, *The Magic Dreidels*, and *The Hanukkah Mice*. (Doc. No. 19 at Ex. 5.)

In addition to parent participation in the "All About Me" unit, one parent came to Reilly's class twice during the year to give presentations on Hanukkah and Passover. Linda Lipski, a parent of a child in Reilly's kindergarten class, offered to come to the class during the week of Hanukkah. (Reilly Dep. at 83-84.) After discussing her presentation with Reilly several weeks prior, Lipski brought in a menorah and a dreidel and read "a Blue's Clues Hanukkah story." (*Id.* at 84-86.) Reilly consulted with Principal Cook about this visit only to make sure it was okay, from a fire safety perspective, to light candles in the classroom. (*Id.* at 90-93.) Otherwise, Reilly indicated that she felt confident that the presentation would be appropriate: "Because Mrs. Lipski and I had already discussed the guidelines ahead of time and considering that Hanukkah is a part of our holiday Social Studies curriculum, I didn't feel – in my opinion I didn't need to consult ahead of time with an administrator about that." (*Id.* at 93.) Reilly also noted that both the menorah and dreidel are symbols used on activity work sheets in the social studies curriculum (*id.* at 95) and that there was a picture of

a Christmas tree hanging in the classroom (*id.* at 148). She also discusses Christmas and Kwanza as part of the winter holiday unit in the Social Studies curriculum.[9] (*Id.* at 100.) Later in the year, Lipski again offered to come to the classroom, this time to present on the holiday of Passover. (*Id.* at 117.) Lipski's Passover presentation consisted of the following: "Mrs. Lipski came into the classroom on [a specified date], she read *The Matzah Ball Fairy*[10] to the students and then offered the matzah ball with chicken soup if they'd like to taste it." (*Id.* at 121.) Reilly set up the presentation by discussing the spring holidays of Easter and Passover.

Marple Newtown School District has a policy regarding holiday observance in its schools. The policy expresses the following purpose:

> Our public schools represent a microcosm of society reflecting a pluralistic community enriched by diverse ethnic groups, religious [sic] and cultural heritage; positive resources to be respected and nurtured in education. . . . The Board affirms the worth and dignity of each individual. Sensitivity to each other is a critical component of the framework of the community.

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[9] When asked hypothetically whether she would allow a parent to come in and discuss the Christmas tree, Reilly responded: "In my opinion, if I was teaching about the holiday of Christmas and I wanted to use – or a parent – if they came in and wanted to show that there was a Christmas tree – to the best of my knowledge [they] could show that as a symbol of the Christmas holiday in the classroom." (Reilly Dep. at 149.)

[10] Reilly recalled that the book *The Matzah Ball Fairy* is about a "family [that] eats matzo balls[,] and they float because the matzo balls were light and fluffy." (Reilly Dep. at 123-24.)

(Doc. No. 19 at Ex. 10.) The policy lists as its authority, the First Amendment to the Constitution and the principle of "Separation of Church and State" and provides the following guidelines for principals regarding what is appropriate holiday observance in the schools:

1. Public schools should not be a forum (pupil or teacher) for expressing individual/personal religious preference/doctrine.
2. Religious symbols, cultural themes, etc., as a direct outgrowth of established curriculum, could be displayed together in a sensitively planned, centrally located cabinet. (No "créche" or Nativity scene should be displayed on school property.)
3. A secular "holiday" tree without religious ornamentation in one central location, rather than individual classroom trees, would be an appropriate symbol of the season.
4. Secular "holiday" music, without religious content, is appropriate for all concerts, music classes, and classroom activities.
5. Parties, without religious theme or content, may be planned as a symbol of the season.

(*Id.*) With respect to the "holiday tree," Principal Cook explained that teachers and students may call the tree a "Christmas tree" if they wish and noted that it was called a "holiday" tree in the School Board Policy but that he has "never told people they can't call it a Christmas tree." (Cook Dep. at 61, 67.)

On May 3, 2005, Plaintiff filed this lawsuit against Defendants Marple Newtown School District, Marple

Newtown School District Board of Directors, Robert Mesaros, and Thomas Cook, stating claims under both the Federal and Pennsylvania Constitutions. The Complaint asserts the following six claims: (1) violation of the Free Speech Clause of the United States Constitution; (2) violation of the Free Communication Clause of the Pennsylvania Constitution; (3) violation of the Establishment Clause of the United States Constitution; (4) violation of the Establishment Clause of the Pennsylvania Constitution; (5) violation of the Equal Protection Clause of the United States Constitution; and (6) violation of the guarantee of equal rights and prohibition on discrimination in the Pennsylvania Constitution. (Doc. No. 1 at 9-13.) Plaintiff seeks a declaratory judgment, actual and nominal damages, and litigation costs and attorney's fees. (*Id.* at 14.) On February 23, 2006, Plaintiffs filed the instant Motion for Partial Summary Judgment, seeking judgment in their favor as to the liability of Defendants on all of the claims in the Complaint. (Doc. No. 20.) Defendants filed the Cross-Motion for Summary Judgment asserting that they were entitled to judgment in their favor on the above claims on the same day. (Doc. No. 19.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could

return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Phila.*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). We do not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

A. Free Speech Claim

Plaintiff contends that in preventing her from reading a passage from the Bible to her son's kindergarten class, Defendants deprived her and her son, Wesley, of their rights to free speech.[11] We observe, at the outset, that this case raises some very perplexing questions of Constitutional law. As the Second Circuit noted in *Peck v. Baldwinsville Central School*, 426 F.3d 617 (2d Cir. 2005), the case before us "invites us to cut a path through the thorniest of constitutional thickets-among the tangled vines of public school curricula and student freedom of expression." *Id.* at 620. It is particularly difficult given the confusion both in the courts and in schools regarding the difference between appropriate cultural education and prohibited religious expression. *See Roberts v. Madigan*, 921 F.2d 1047, 1053 (10th Cir. 1990) ("Here, we face the difficulty of determining the proper balance between the freedom from religious coercion created by state-sponsored religion and the inescapable reality that our culture

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[11] We note that Plaintiffs contend that Defendants' actions violated both Wesley's and Donna Busch's rights to free speech. Because it was Donna Busch who attempted to exercise her free speech rights in reading the Bible to Wesley's class, we assume that Plaintiffs intend to invoke Wesley's rights to free speech by virtue of the corollary "right to receive information and ideas." *Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). The Supreme Court has indicated that "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them" and that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id.* (emphasis in original).

is permeated by religious symbols and rituals. Nowhere has the proper line of demarcation been more difficult to define than in our nation's public schools."). We will approach this matter as we do all questions of free speech rights, regardless of whether they implicate religious expression.[12]

1. *Type of Forum*

The first step in any free speech analysis is to determine the type of forum at issue, a determination that will dictate the level of scrutiny that must be applied to state actions that restrict speech.[13]

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[12] Defendants only briefly discuss free speech issues in their briefs, arguing instead that the courts have absolutely precluded bible reading in public schools. (*See* Doc. No. 19 at 7-19.) Defendants rely on *School District of Abington Township v. Schempp*, 374 U.S. 203, 224 (1963), and the 1963 Pennsylvania Attorney General's Opinion, *Bible Reading in Public Schools*, 30 Pa. D. & C.2d 643, 647 (Pa. Dept. Just. 1963), to support their argument. We note, however, that both *Schempp* and the Attorney General's Opinion address the issue of a school authority figure or classroom teacher reading the Bible as a mandatory exercise in the school and thus rest their findings on the Establishment Clause. Because this case involves the more complicated problem of a student and/or parent seeking to read the Bible as part of a "show and tell"-type exercise, we must first address the issues through a free speech analysis and then through the Establishment Clause.

[13] The free speech analysis under the Federal Constitution also applies to the free speech claim under the Pennsylvania Constitution. *See Com., Bureau of Prof'l and Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340, 343 (Pa. 1999) ("In analyzing a case such as the present one where the argument is based on Article I, § 7 of the Pennsylvania Constitution, we observe the same minimum standards of analysis and substantive protection as the Supreme Court of the United States has required under the federal constitution."). As a

Peck, 426 F.3d at 625. The traditional public forum is the most "speech-protective" in that "content-based restrictions will be upheld only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end." *Peck*, 426 F.3d at 626 (quoting *Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004)). Next along the spectrum are "designated" and "limited" public fora. A designated public forum is created when the state has opened for public discourse a place that is not traditionally open to public assembly. *Id.* In such a forum, the government may restrict speech only when it could have done so in a traditional public forum. *Id.* Similarly, a limited public forum is created when the state opens a non-public forum with some limits on the nature of the expressive activity. *Id.* Finally, a non-public forum is "neither traditionally open to public expression nor designated for such expression by the State." *Id.* The standards for limited and non-public fora are similar. In both, the government can restrict speech—including the content of such speech—so long as the restrictions are reasonable and viewpoint neutral. *Id.*

The incident in this case took place at an elementary school and, more particularly, in a kindergarten classroom. As described above, the setting was a "show and tell"-type exercise in which parents were invited into the classroom to share a story, game, craft or snack as part of their children's "All About

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result, this section applies to both of Plaintiffs' free speech claims (Counts I and II).

Me" week. This was clearly not a public forum.[14] The Supreme Court has held that "school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public or by some segment of the public, such as student organizations." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (internal citations and quotations omitted). Here, Reilly, the kindergarten teacher, opened her classroom to specific people, the parents of her students, for a specific delineated purpose. At most, the classroom became a limited public forum in which the state had the right to restrict the nature of the expressive activity.

2. *Level of Scrutiny in this Forum*

Whether Reilly's classroom during the "All About Me" unit was a limited or non-public forum, the same basic standard applies. While the government may restrict speech in these fora, such restrictions must still be reasonable and viewpoint neutral. *Peck*, 426 F.3d at 626. The initial question to be resolved is whether, in preventing Plaintiff from reading the Bible to Wesley's class, Defendants restricted the content or viewpoint of Busch's speech. "[D]rawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which tradi-

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[14] Both parties agree with this premise. Defendants argue this point in their Motion. (*See* Doc. No. 19 at 20-22 (arguing that the "All About Me" unit of study did not constitute a public forum in the kindergarten classroom).) Plaintiffs do not quarrel with this notion. (Doc. No. 23 at 3 ("Wesley Busch's classroom was not a public forum, and the school is afforded wide latitude in implementing the curriculum.").)

tionally has been prohibited even in non-public fora, is, to say the least, a problematic endeavor." *Id.* at 630. This problem is all the more difficult in the context of religious expression since "[i]t is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995), *quoted in Peck*, 426 F.3d at 630.

Plaintiff, relying on then-Judge Alito's dissent in *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000), argues that the school's action in preventing the Bible reading was viewpoint discrimination. Judge Alito commented generally that "discrimination based on the religious character of speech is viewpoint discrimination." *Id.* at 210 (Alito, J., dissenting). This contention was based on two Supreme Court cases: *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). In *Lamb's Chapel*, the Court found prohibited viewpoint discrimination in a school's decision to permit use of school facilities by a variety of groups while denying use of the property to a group wanting to address child-rearing issues from a Christian perspective. *Lamb's Chapel*, 508 U.S. at 393-94; *Oliva*, 226 F.3d at 211. Similarly, *Rosenberger* held that the university's refusal of student-activities funds to a religious student publication solely because of its religious perspective was likewise prohibited viewpoint discrimination. *Rosenberger*, 515 U.S. at 831; *Oliva*, 226 F.3d at 211. In both of these cases, the government action with which the Court took issue did not prevent speech that merely involved

religion, but instead prevented speech because of its religious perspective. Because the restriction was based on the religious perspective of the group, such action is viewpoint discrimination. If, however, a school, seeking to promote the study of mathematics, offered funding to groups focused on mathematics and, in that context, denied funding to a group that studied religion, the conclusion would be different. Such action would constitute permissible content-based discrimination. Thus, the context of and intent behind the government action together with the nature of the speech inform the determination of whether the action amounts to content or viewpoint discrimination.

In this case, we agree with Plaintiff that the school's action constituted viewpoint discrimination. Plaintiff intended to read the Bible to the kindergarten class and not merely to talk about the Bible or its history as part of the social studies curriculum. The particular Biblical verses she intended to read certainly convey a religious perspective or viewpoint. For example, the very first verse she planned to read states: "Give thanks unto the Lord, for he is good; because his mercy endures forever." In addition, Principal Cook's explanation for his action indicates that he was motivated by a concern about the religious viewpoint of the material. He prohibited the Bible reading because it was "promoting religion and . . . proselytizing for promoting a specific religious point of view." (Cook Dep. at 105-06.) Moreover, Reilly, with Principal Cook's permission, had previously allowed discussions of Hanukkah, Christmas, Passover, and Easter in her classroom as part of the regular curriculum. Clearly, the school did not preclude all speech that dealt in any way with

religion but precluded speech in this situation because it expressed a religious viewpoint, which Principal Cook believed was inappropriate in the context of a kindergarten classroom. We are satisfied that the school's action amounted to viewpoint discrimination.

3. *Under What Circumstances is Viewpoint Discrimination Permitted?*

Plaintiff's argument to the contrary notwithstanding, our conclusion that Defendants' action constituted viewpoint discrimination does not end the inquiry. The restriction of Busch's speech in this case came in the context of a parent presenting to a kindergarten class, a context that is very relevant to the lawfulness of the school's action. While viewpoint discrimination is generally not permissible even in a non-public forum, there are circumstances in which it may be allowed.

The circumstances under which viewpoint discrimination is permitted is a matter of disagreement among the Circuit Courts. There is broad agreement that under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), private student expression may not be limited based on its viewpoint unless the school demonstrates a compelling interest such as the need to prevent substantial disorder or the invasion of the rights of others. *Id.* at 511, 513; *see also Oliva*, 226 F.3d at 211-12 (Alito, J., dissenting). However, the Court in *Hazelwood* appeared to take a different approach for speech that was school-sponsored or that "members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 270-71 ("The question whether the First Amendment requires a

school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."). The *Hazelwood* Court held that:

> the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 272-73. Circuit Courts have reached conflicting conclusions regarding the meaning of *Hazelwood*. Several courts have concluded that viewpoint based decisions by educators are permissible in circumstances similar to those presented in *Hazelwood*, while others maintain that *Hazelwood* did not change the basic prohibition against viewpoint discrimination.[15] We will address this question in

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[15] *See Peck*, 426 F.3d at 632 n.9 (First and Tenth Circuits allow viewpoint discrimination by schools; Ninth and Eleventh maintain general requirement of viewpoint neutrality; and Third Circuit held that a viewpoint restriction "may reasonably be related to legitimate pedagogical concerns" and therefore constitutional, but on a rehearing en banc, the circuit was equally-divided on this question) (citing *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d

light of Third Circuit authority, which is not definitive on the issue but provides sufficient guidance to make a determination.

Before addressing our interpretation of *Hazelwood*, we will first discuss why *Hazelwood* is clearly applicable to the case before us. The Supreme Court made it clear in *Hazelwood* that speech that might be viewed as school-sponsored should be analyzed in its own category. *Hazelwood*, 484 U.S. at 270-71. The speech at issue in *Hazelwood* appeared in the student newspaper and thus bore the imprimatur of the school. Similarly, this case presents a situation in which the students, here kindergartners, would likely view the speech at issue as school endorsed. In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Supreme Court noted that in determining whether there is a perception of government-endorsed speech, the focus must be on the effect of the speech or display on the listeners and viewers. "The effect of the display depends upon the message that the government's practice communicates: the question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity,

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817, 829 (9th Cir. 1991) (*en banc*); *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc* 226 F.3d 198 (3d Cir. 2000)).

In *Peck*, the Second Circuit concluded that "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even* if reasonably related to legitimate pedagogical interests," *Peck*, 426 F.3d at 633 (emphasis in original), thereby agreeing with the Ninth and Eleventh Circuits.

turns upon the context in which the contested object appears."[16] *Id.* at 595 (internal citations and quotations omitted). Here, the context was a kindergarten classroom. The speech at issue would have come from a parent, typically seen as an authority figure by young children, standing at the front of the classroom to present in place of the teacher and as part of the school curriculum. This situation clearly creates a perception of school-endorsed speech.[17] *See Walz ex*

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[16] Justice O'Connor's observations with regard to the endorsement question are also instructive:

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. . . . If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (*quoted in Roberts*, 921 F.2d at 1057). After citing Justice O'Connor's approach, the Tenth Circuit determined that in the context of a teacher who sought to silently read his Bible during class, "it is reasonable to conclude that not all of [the teacher]'s students would receive a purportedly secular message." *Roberts*, 921 F.2d at 1057.

[17] Plaintiffs contend that it is "nonsense" to argue that "a parent carries a mantle of authority that, in the minds of students, is indistinguishable from teachers." (Doc. No. 20 at 19.) Moreover, Plaintiffs assert that "to suggest that Wesley's classmates would confuse Wesley's mother for a teacher, principal, or other school administrator does not fairly credit the perceptive capabilities of five and six year-olds." (*Id.*)

rel. Walz v. Egg Harbor Tp. Bd. of Educ., 342 F.3d 271, 277 (3d Cir. 2003) ("[I]n an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred. . . . While secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis, kindergartners and first graders are different."); *see also C.H. v. Oliva*, 990 F. Supp. 341, 354 (D.N.J. 1997), *aff'd*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000) (noting in context of student reading passage from Bible to his first grade classmates: "If [student]'s teacher were to praise him for completing his reading assignment skillfully, (*i.e.* by saying something like 'very good'), it is not unlikely that a child in first grade could interpret that comment as an endorsement of the story and the book."); *Peck*, 426 F.3d at 629 (finding application of *Hazelwood* appropriate to speech in form of student's poster where it was "indisputably part of the school curriculum . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) ("Few activities bear a school's 'imprimatur' and 'involve pedagogical interests,' more significantly than

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Plaintiff misses the point. The concern is not that the students will think that Wesley's mother is actually a teacher or school administrator, but rather that a parent presenting to the class carries the same level of authority as does a teacher and that in the context of a classroom, that authority creates the perception that the school endorses the speech of the parent.

speech that occurs within a classroom setting as part of a school's curriculum."); *Roberts*, 921 F.2d at 1057 (affirming district court's view that teacher reading Bible to himself "communicated a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class."). We are satisfied that *Hazelwood* clearly applies to the instant situation.

In addition, we are persuaded that the proper interpretation of *Hazelwood* suggests that in contexts where there is a likelihood of a perception of school-endorsed speech, the lower standard applies to a school's actions restricting that speech. Thus, schools may restrict speech even based on its viewpoint "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 272-73. In reaching this conclusion, we are guided by recent Third Circuit cases that dealt explicitly with religious speech by elementary school students as part of classroom or educational activities. As noted above, the Third Circuit in *C.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), originally endorsed this view of *Hazelwood*, permitting a school to prevent a student from reading the Bible to his first grade classmates. *Id.* at 172-73 ("Hazelwood clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns."). However, this opinion was vacated, and a rehearing en banc was granted. 197 F.3d 63 (3d Cir. 1999). On rehearing, the court split evenly on the bible reading question, affirming the District Court without explication and dismissing a second claim about a

religious-themed poster on procedural grounds. 226 F.3d 198 (3d Cir. 2000). Since such decisions have no precedential value, *see Rutledge v. U.S.*, 517 U.S. 292, 304 (1996), the *Oliva* case leaves us with little reliable guidance.

Nevertheless, in 2002, the Third Circuit addressed a similar question in *Walz ex rel. Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003). *Walz* dealt with two instances in which an elementary school prevented a child from distributing religious-themed gifts in the context of school holiday parties. The parties were held in class, and the Parent Teacher Organization ("PTO") encouraged parents to donate gifts that the PTO would then distribute so as not to single out children who did not or could not bring presents. *Id.* at 273. In the first instance, a student, in pre-kindergarten at the time, brought and tried to distribute pencils with the imprint "Jesus [Loves] The Little Children" (heart symbol). *Id.* The teacher confiscated the pencils, and the school superintendent determined that "the pencils could not be distributed because the young children and their parents might perceive the message as being endorsed by the school." *Id.* In the second instance, the student, now in kindergarten, sought to distribute candy canes during the class holiday party that had a story called "A Candymaker's Witness" attached. *Id.* at 273-74. The story described the candy cane as incorporating symbols of the birth, ministry, and death of Jesus and concluded with a prayer that the candy cane be used "to witness to The Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today." *Id.* at 274. The school responded that the student

could hand out the candy canes before school, during recess, or after school, but not during the classroom party. *Id.* The Third Circuit affirmed the District Court, concluding that in both instances, the school's action was justified and did not violate the student's First Amendment rights. *Id.* at 280-81. In reaching this conclusion, the Third Circuit emphasized the importance of the age of the children involved and the fact that "as a general matter, the younger the students, the more control a school may exercise." *Id.* at 276. The Court also noted that the risk that speech will be perceived as school-endorsed is heightened in an elementary school classroom. *Id.* at 277. The Third Circuit distinguished between "expression that symbolizes individual religious observance such as wearing a cross on a necklace, and expression that proselytizes a particular view." *Id.* at 278-79. Citing *Hazelwood*, the Court ultimately concluded that "[i]n the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval" and found such action to be appropriate given the school's "valid educational purpose." *Id.* at 280-81.

Despite the fact that *Walz* does not explicitly endorse the original *Oliva* panel's view of *Hazelwood*, its language indicates that intention. The case is particularly instructive for our purposes. Not only do we read *Walz* as permitting viewpoint discrimination in limited circumstances when there is a valid educational purpose, we are also persuaded that *Walz* confirms that a school's intent to avoid endorsing proselytizing speech is one such valid pur-

pose. Thus, a school's avoidance of an Establishment Clause violation, the perception that it promotes or endorses a religious viewpoint, is a legitimate interest that justifies viewpoint discrimination.

The instant case is remarkably similar. Plaintiff's reading of the Bible to the kindergarten class could easily have been interpreted by the young students as endorsed by the school. In addition, the principal's explicit intent was to prevent speech that proselytized or promoted a specific religious viewpoint so as not to violate the Establishment Clause's prohibition on state support and promotion of religion. (*See* Busch Dep. at 139-40 (Cook told Plaintiff she could not read the Bible because "it's against the law . . . of separation of church and state . . .").) The actual verses that Busch planned to read serve only to support Principal Cook's concern. For example, "Give thanks unto the Lord, for he is good; because his mercy endures forever" indisputably communicates a religious message. *Cf. County of Allegheny*, 492 U.S. at 598 (finding the phrase "Glory to God in the Highest!" in a banner over a crèche to be "indisputably religious-indeed sectarian-just as it is when said in the Gospel or in a church service"). Thus, the school acted appropriately in preventing the Bible reading because it was justifiably concerned that the public school would be perceived as endorsing speech that promoted a religious viewpoint, a violation of the Establishment Clause.

Plaintiff attempts to distinguish *Walz* by pointing to the *Walz* court's distinction between speech that is invited by an activity where the school seeks students' personal views and speech that is disrup-

tive to the educational setting. The *Walz* Court did make this distinction, noting:

> For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing himself in the context of a school assignment or activity where the school has sought students' personal views.

Walz, 342 F.3d at 278. However, in the next sentence the court explained that "in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message." *Id.* While Plaintiff is correct that the "All About Me" unit is similar to a "show and tell" exercise, reading verses of the Bible to students is significantly different than passing around an ornament and describing its personal meaning. The "All About Me" exercise certainly invited student expression and parent participation. Its goal was to help students learn about one another. It did not, however, call for students to express their specific religious views as would a mock debate that explicitly provides a context for such expression. Plaintiff could have responded to the assignment by speaking with the children about the importance of religion in their family life and describing the time she and Wesley spend reading the Bible and attending church. Such a presentation would have been responsive to the assignment and would not have promoted a specific message. The school had a valid

educational purpose in preventing Plaintiff's reading of the Bible to a captive audience of kindergarten students. Under *Hazelwood*, the school's action was proper since it was reasonably related to legitimate pedagogical concerns.

4. *The School's Action was Justified Even Under the Higher Standard*

Even if we were to conclude that *Hazelwood* does not permit viewpoint discrimination in the circumstances described, we would still find the school's action to be appropriate under the higher standard that requires a compelling interest to restrict speech based on its viewpoint. *See Oliva*, 226 F.3d at 211 (Alito, J., dissenting) ("[A] public school may even restrict speech based on viewpoint if it can show a compelling interest for doing so."). [18] While the Supreme Court has not found a school's avoidance of an Establishment Clause violation to be a compelling interest in this context, it has left open that possibil-

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[18] We note that this case can be distinguished from Judge Alito's dissent in *Oliva*. In *Oliva*, Judge Alito commented on the school's action in taking down and re-posting in a less prominent location a poster depicting Jesus. The poster was made by a student in response to an assignment to make posters depicting what the students were "thankful for." *Oliva*, 226 F.3d at 201. Judge Alito found the school's action to be impermissible viewpoint discrimination after concluding that "a reasonable observer would not have viewed the exhibition of [the poster] along with the secular posters of his classmates as an effort by the school to endorse religion in general or Christianity in particular." *Id.* at 212. In contrast, Plaintiff's reading of Biblical verses to kindergarten students would certainly have been viewed as carrying such an endorsement.

ity.[19] *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (holding that "the interest of the University in complying with its constitutional obligations [avoiding violation of the Establishment Clause] may be characterized as compelling"); *see also Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) ("a State has a compelling interest in not committing *actual* Establishment Clause violations" (emphasis in original)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-113 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.").[20]

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[19] In each of the cases in which the Supreme Court has spoken of avoiding Establishment Clause violations as a compelling interest, it has concluded that under the particular circumstances before it, the state's actions went beyond avoiding such a constitutional violation and that such actions did not constitute a compelling interest.

[20] *Good News Club* is easily distinguishable from the instant case because the Court in *Good News Club* concluded that there was no reason to view the religious activity as school endorsed. In that case, the school, relying on the Establishment Clause, had refused to allow a religious club to use its facilities. However, because the club's meetings were held after school hours, were not sponsored by the school, and required parental permission to attend, there was no real concern that children would perceive school endorsement. *Good News Club*, 533 U.S. at 112-18. As a result, there was no real Establishment Clause problem. In this case, the perception of school endorsement of a

We conclude that a school's avoidance of an Establishment Clause violation is a compelling interest such that it justifies viewpoint based restriction of speech. In situations where the school is called upon to permit or deny a student's religious expression, the rights of the various parties are in conflict. The student speaker certainly has a right to free speech, albeit limited by the context of the school environment. The student listeners, their parents, and all other school community members have a right to be free from government promotion of religion. In this context, the "right to freedom of speech . . . must yield to compelling public interests of greater constitutional significance." *Fink v. Bd. of Ed. of Warren County Sch. Dist.*, 442 A.2d 837, 842 (Pa. Commw. Ct. 1982). The purposes behind the Establishment Clause are clear:

> The Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

Engel v. Vitale, 370 U.S. 421, 431-32 (1962). The Supreme Court has made it clear that the require-

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religious perspective was a justifiable concern given the fact that the speech at issue was to occur in the classroom as part of the curriculum and was to be presented by a parent to a captive audience of kindergarten students. In this context, avoiding an Establishment Clause violation was certainly a compelling interest.

ment of government neutrality towards religion does not, in any way, indicate a hostility towards religion. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435. These principles compel public schools to be vigilant in avoiding promotion of religion or even the perception of school-endorsed promotion. Such action is undoubtedly a compelling state interest and certainly justifies viewpoint based restrictions of speech when that speech may reasonably be seen as bearing the imprimatur of the public school.[21] Accordingly, we conclude that Defendants did not violate Plaintiff's free speech rights in preventing her from reading the Bible to her son's kindergarten class and are compelled to grant Defendants' Motion for Summary Judgment on this claim.

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[21] Plaintiff argues that "allowing a child to express his love of the Bible – in an exercise designed to highlight *his* interests" cannot possibly be seen to advance one religion over another, or religion over non-religion. (Doc. No. 20 at 18.) However, there is a distinct difference between expressing one's love of the Bible and reading verses from it. The former can be accomplished, without creating an Establishment Clause problem, by speaking about the Bible in a way that does not promote a religious viewpoint or carry the potential to offend those who do not similarly believe. Reading verses from the Bible in the context of a kindergarten class, cannot be done without, at the very least, creating the perception of the school's promotion of religion.

B. Establishment Clause Claim

Plaintiffs also contend that Defendants' actions constituted a violation of the Establishment Clause.[22] Defendants argue that the opposite is true and that they took action specifically to avoid such a violation. Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I.[23] The Supreme Court has made clear that this clause requires governmental neutrality *vis-a-vis* religion in that "government should not prefer one religion to another, or religion to irreligion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Claims of violations of the Establishment Clause are governed by the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test requires the following: "First, the [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not

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[22] The Pennsylvania Supreme Court has held that "the provisions of Article I, Section 3 of [the Pennsylvania] constitution do not exceed the limitations in the [F]irst [A]mendment's [E]stablishment [C]lause." *Springfield Sch. Dist., Del. County v. Dep't of Ed.*, 3 97 A.2d 1154, 1170 (Pa. 1979) (citing *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366, *cert. denied*, 419 U.S. 967 (1974)); *see also Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005). As a result, this section applies to both of Plaintiff's Establishment Clause claims (Counts III and IV).

[23] The Fourteenth Amendment imposes this limitation on the states and their political subdivisions. *Modrovich v. Allegheny County, Pa.*, 385 F.3d 397, 400 (3d Cir. 2004) (citing *Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985)).

foster an excessive government entanglement with religion." *Id.* at 612-13 (internal citations and quotations omitted).

Addressing the first prong, it is clear that the school's actions in preventing the reading of the Bible to the kindergarten class had a secular purpose. The only evidence relating to the school district's motives indicates that the school acted in order to avoid violating the Establishment Clause. Plaintiff herself testified that Principal Cook told her she could not read from the Bible because reading the Bible to the class would be "against the law . . . of separation of church and state." (Busch Dep. at 139-40.) Cook explained (and then-Superintendent Mesaros agreed) that he determined that it was improper to read from the Bible to a class of kindergarten students because he felt that it would be improperly "promoting religion and . . . proselytizing for promoting a specific religious point of view." (Cook Dep. at 105-06.) The school's intention, to avoid an Establishment Clause violation by avoiding the perception of school endorsement of a particular religious point of view, is inherently secular. *See Roberts*, 921 F.2d at 1054 (affirming district court's finding that "the school district had a secular purpose for its actions, namely, to assure that none of [teacher's] classroom materials or conduct violated the Establishment Clause"); *see also Peck*, 426 F.2d at 634 ("While . . . avoidance of the perception of religious endorsement [] is no doubt involved with religion, such a goal does not bespeak an intent to inhibit religion itself.").[24]

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[24] Plaintiff argues that preventing proselytizing in the classroom is not a secular purpose and that Defendants' actual

The second prong, that the principal or primary effect of the action must not advance or inhibit religion, is also clearly met in this case. This prong of the *Lemon* test "is not satisfied if official action, regardless of its purpose, 'conveys a message of endorsement or disapproval' of religion." *Id.* at 1054-55 (quoting *Wallace v. Jaffree*, 472 U.S. at 56 n.42) (citing *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)). Plaintiff contends that "allowing Wesley to share his love of the Bible would not have advanced religion over non-religion" and that "prohibiting Wesley's expression inhibited religion." (Doc. No. 20 at 22.) In fact, the school did not prevent Wesley or his mother from expressing their love of the Bible and their commitment to their religion. Plaintiff did

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intent for *Lemon* purposes remains a question of fact. (Doc. No. 20 at 22 n.9.) On the first count, we disagree – preventing the promotion of a religious point of view in a context that would be perceived as school endorsed is certainly a secular purpose.

On the second count, Plaintiff does not fully describe what she deems to be the dispute of fact regarding the school's motivation. There is no evidence that Principal Cook acted based on any motivation other than that of preventing the promotion of a religious viewpoint in the classroom. Plaintiff's characterization of the school's actions as expressing a hostility to Christianity is merely a characterization, with no evidence to support it. Furthermore, Wesley's ability to present his poster to the class and describe the significance of the picture of the church and the words "I love to go to the House of the Lord" or "I like to go to church" certainly undermines Plaintiff's unsupported allegation that the school's actions demonstrate a hostility towards Christian expression. *See Peck*, 426 F.3d at 634 (noting that school's display of poster with church on it cuts against plaintiff's "bare allegation that the [School] District's actions were intended to demonstrate hostility toward religion.").

not seek to come to Wesley's class to tell the other students about her time with Wesley reading the Bible or the role of religion in their family life. She sought instead to read verses from the Bible to the kindergarten students.[25] As previously discussed, the likelihood that this activity would be perceived by such young students as a school endorsement of the Bible was significant. Thus, the effect of the Bible reading, had the school allowed it, would, in fact, have violated the second prong of the *Lemon* test by "conveying a message of endorsement" of a particular religious belief. On the other hand, the prevention of the Bible reading had a purely neutral effect. In preventing Plaintiff's Bible reading, Principal Cook spoke with the teacher and then Plaintiff in the hallway, away from the children. The students were not told that Plaintiff had planned a different reading. Plaintiff requested and was given a new book to read to the class so that she could still participate in Wesley's "All About Me" week. In sum, the school's actions did not have the effect of

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[25] Plaintiff also contends that the school invited Wesley and his mother to share an interest "so long as the interest did not pertain to religion" and in so doing "endorsed non-religion over religion." (Doc. No. 20 at 23.) This is not a proper characterization of the undisputed facts. The school did not prevent Wesley from sharing any interest related to religion. In fact, the school permitted him to share his poster with the class and describe why he had placed a picture of a church on that poster. During the course of the year, the class discussed numerous holidays, including Christmas, Easter, Passover, Hanukkah, and Kwanza. However, as will be explained in more detail *infra*, there is an important distinction between discussing religion and reading the Bible to young students in the classroom. The school, justifiably, prevented only the latter.

advancing or inhibiting religion but merely sought to avoid a constitutional violation.

Plaintiff contends that in allowing Mrs. Lipski to speak to the class about Hanukkah and Passover but preventing Plaintiff from reading the Bible, the primary effect must have been to send a message of exclusion to Christians and Christian expression. Plaintiffs add that the School District's policy, allowing a "holiday tree" without religious ornamentation, allowing religious symbols to be displayed together, and prohibiting a crèche or nativity scene further excludes Christian expression. Plaintiffs' argument "sweeps much too broadly" and fails to note the relevant distinctions at play. *Roberts*, 921 F.2d at 1055. The school allows discussions of religion, displays of religious symbols when placed together and sensitively planned, and discussions of cultural elements of religious celebrations. It does not ban all Christian expression but rather seeks to ensure that the manner in which religion is raised in the school comports with the Establishment Clause in that it does not give the impression that the school is endorsing a particular religious point of view. As the Tenth Circuit explained:

> [T]he Establishment Clause focuses on the manner of use to which materials are put; it does not focus on the content of the materials *per se*. . . . It is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references in order to prevent teachers from inculcating specific religious values. Instead, school officials must be allowed, within certain bounds, to exercise discretion in determining what mate-

> rials or classroom practices are being used appropriately.

Id. It is clear that Defendants' actions in preventing the Bible reading did not have the effect of advancing or inhibiting religion.

Finally, Defendants' actions satisfied the third prong in that they did not foster an excessive government entanglement with religion. We observe that the mere request that Plaintiff not read from the Bible certainly did not, in and of itself, cause excessive entanglement with religion. Its purpose and effect was to avoid just such a constitutional violation. Plaintiff contends that it is Defendants' lack of "a coherent policy governing parental participation in classroom activities or religious expression" and the resulting *ad hoc* decisions that cause excessive entanglement when the school as a government entity must scrutinize speech to determine "how much religion is too much." (Doc. No. 20 at 26-27.) We disagree with Plaintiff's characterizations of the school's actions in this regard. The school is not seeking to determine when the quantity of religious expression exceeds some benchmark, but rather it focuses on the type of expression, the context of that expression, and the way in which religious materials are used. All of these guidelines are not only acceptable but required under the Establishment Clause.

Nevertheless, Plaintiff is correct that decisions on religious expression tend to be made on an *ad hoc* basis. Unfortunately, this results not from the school's lack of a clear policy, but instead from the fact-intensive nature of each inquiry and the somewhat confounding treatment of these questions by the courts. While this opinion may provide some

guidance to educators, we have no doubt that this area will remain confusing and will always require an individualized approach. Educators in public schools are called upon to make difficult distinctions between permissible cultural or religious expression and impermissible religious promotion. These decisions must be made based on the identity of the speaker, the context of the speech, the age of the listeners, and the way in which the religious content is delivered and likely to be heard. No policy will prevent such fact intensive inquiries. While it is unfortunate that each analysis must be so complicated, a school's effort to abide by the somewhat hazy requirements of the Establishment Clause does not, on its own, create excessive entanglement with religion. Were that the case, every municipality or government agency would violate the Clause every time it made decisions about holiday decorations or funding for religious entities. Government must be free to grapple with these questions without violating the Constitution by having the discussion. Accordingly, we are compelled to conclude that the school satisfied the third prong of the *Lemon* test and did not, by its actions, violate the Establishment Clause of the First Amendment. We will grant Defendants' Motion for Summary Judgment on this claim.

C. Equal Protection Claim

Plaintiff argues, in addition to her Free Speech and Establishment Clause claims, that Defendants also denied her and Wesley equal protection of the laws.[26] Plaintiff contends that in allowing other

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[26] Pennsylvania courts evaluate equal protection claims under the Pennsylvania Constitution, Pa. Const., Art. I, §§ 1, 26, under the same standards applicable to equal protection

parents and students of non-Christian faiths to share religious traditions during classroom activities, Defendants subjected her and her son to disparate treatment in violation of the Fourteenth Amendment. While Plaintiff does not point to specific instances of disparate treatment and instead incorporates her entire brief by reference, we assume the equal protection claim to be focused on Mrs. Lipski's two presentations to the class about Hanukkah and Passover respectively. If these presentations were permitted, Plaintiff argues, Busch's reading of the Bible should have been allowed as well.[27] Defen-

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claims under the Fourteenth Amendment to the Federal Constitution. *Asian-American Licensed Beverage Ass'n v. Commonwealth of Pennsylvania*, No. Civ. A. 05-CV-213 5, 2005 WL 3077246, at *4 n.3 (M.D. Pa. Nov. 3, 2005) (citing *Harrisburg v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) ("[T]he meaning and purpose of the Equal Protection Clause of the United States Constitution and the State's prohibition against special laws, are sufficiently similar to warrant like treatment, and contentions concerning the two provisions should be reviewed simultaneously") (citations omitted)). As a result, this section applies to both of Plaintiff's equal protection claims (Counts V and VI).

[27] In addition, throughout their brief, Plaintiff makes reference to the School Board Policy that allowed some religious symbols to be displayed sensitively together but prohibited a crèche or nativity scene. Plaintiff has pointed out that symbols of Hanukkah, including a menorah and dreidel, were used on activity sheets but the school's policy allowed only a "holiday" tree with secular ornaments to be placed in a central location in the school. Principal Cook made clear that teachers and students were free to refer to the tree as a Christmas tree if they so desired. In addition, Reilly displayed a picture of a Christmas tree in her classroom and read numerous stories with Christmas and Hanukkah themes to her class.

dants counter that no other parent presentations during "All About Me" week involved religious expression. However, this fact is irrelevant to the equal protection determination. Whether or not the parents of other faiths presented to the class as part of the same curricular program is not determinative, and Defendants' contention views the issue through too narrow a lens. Nevertheless, we are not persuaded that Defendants' actions throughout the course of the year in allowing some parent presentations but not others violated the Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).[28] Thus, the first question in

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While we do not view these examples as the basis of an equal protection claim (both because they have not been sufficiently developed in the record and because the school appears to display both Hanukkah and Christmas symbols), we note that it is simply ludicrous to refer to the Christmas tree as a "holiday" tree. The school and, as will be discussed *infra*, the Supreme Court of the United States consider the Christmas tree to be a secular symbol of the Christmas holiday. If the school makes the choice to display it, it should justify that choice based on applicable law but should not try to avoid it by masking its choice in secular language.

[28] The Seventh Circuit has commented that in terms of discrimination between religious groups, the First Amendment provides the primary source of protection while the equal protection clause merely demands that such distinctions not be arbitrary. *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988)

this analysis must focus on whether the school's actions dealt with similarly situated people. In the circumstances presented by this case, we are compelled to conclude that they did not.

When questioned about why the teacher and principal permitted Mrs. Lipski's presentations but would not permit Busch's Bible reading, Principal Cook made it clear that he viewed those presentations as acceptable discussions of Jewish culture within the context of the curriculum. (Cook Dep. at 91, 93-94 ("I think that when the menorah was presented it was presented in a way which was related to the curriculum in terms of its importance historically and culturally.").) The Supreme Court has made clear that it is impermissible for the government to celebrate Christmas or any other holiday as a religious holiday because that would be government endorsement of a particular religious point of view. *See County of Allegheny*, 492 U.S. at

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("This is not because discrimination between religions is deemed on a constitutional par with those purely 'economic' discriminations that the equal protection clause, in modern interpretations, treats so leniently, but because the religious dimension of the discrimination is governed by the religion clauses of the First Amendment, leaving for the equal protection clause only a claim of arbitrariness unrelated to the character of the activity allegedly discriminated against.").

Clearly, a state law granting a denominational preference without a compelling interest would violate the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) ("The First Amendment mandates government neutrality between religion and religion. . . . In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." (internal citations and quotations omitted)).

611 ("If the government celebrates Christmas as a religious holiday . . . it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief."). However, government may celebrate a holiday associated with one religion if it is "confin[ed] . . . to the holiday's secular aspects." *Id.* In *County of Allegheny*, the Court concluded that it was impermissible to place a crèche with a banner stating "Glory to God in the Highest!" in the main part of the county courthouse because in doing so "the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." *Id.* at 600. The Court also noted that a display of a menorah may present "a closer constitutional question" because "the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions." *Id.* at 613-14. Similarly, the Court commented that "[a]lthough Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas." *Id.* at 616. Thus, in reaching the conclusion that the crèche display at issue violated the Establishment Clause whereas the menorah and Christmas tree display did not, the Court made a subtle but important distinction that educators in public schools must regularly make. Based on the "unique circumstances" involved in each instance, the Court concluded that some displays can be permissible cultural representations while others carry an impermissible message of government endorsement of religion. *See id.* at 595,

621;[29] *see also Bible Reading in Pub. Sch.*, 30 Pa. D. &. C.2d 643, 649 (recognizing the difference between teaching about religion and the teaching of religion).

The same is true of the distinctions made by Defendants in this case. While Plaintiff contends that Defendants committed an equal protection violation, they offer no evidence to suggest that the presentations by Mrs. Lipski to the kindergarten class were anything but secular, cultural lessons about the holidays. While it is true that both Hanukkah and Passover are Jewish holidays, the presentations themselves did not in any way promote a religious viewpoint. For Hanukkah, Mrs. Lipski brought in a menorah and dreidel to show the class and read a story from the "Blue's Clues Hanukkah" book. Similarly, for Passover, Mrs. Lipski brought in matzah ball soup for the children to taste if they wished and read *The Matzah Ball Fairy*, a fanciful children's story about a food typically eaten on that holiday. The Hanukkah presentation was permitted as part of the social studies curriculum in which Reilly discussed the holidays of Christmas, Hanukkah, and Kwanza. Similarly, Reilly set up the presentation on Passover by discussing the spring holidays of Easter and Passover. In each instance, the context of the presentation made it clear that the information was being presented to the students as part of their education

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[29] The *County of Allegheny* Court also noted that its view of the menorah as a secular symbol could be altered were it presented in a different context. *County of Allegheny*, 492 U.S. at 621 n.70 ("[N]othing in this opinion forecloses the possibility that on other facts a menorah display could constitute an impermissible endorsement of religion.").

on various religions and cultures. In contrast, Plaintiff's intended Bible reading had none of these elements. As part of a "show and tell"-type exercise and without explanation or context, Plaintiff sought to read verses from the Bible to the kindergarten class. Rather than teaching about religion, such an exercise could easily be perceived as being an endorsement of religion. While it is subtle, this distinction is all-important. Mrs. Lipski and Plaintiff were not similarly situated because their presentations differed in content, form, and context in ways that justifiably impacted the school's decision in each case. As a result, the different treatment each received did not give rise to an equal protection violation.[30] Accordingly, we are compelled to grant Defendants' Motion for Summary Judgment on this claim as well.

An appropriate Order follows.

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[30] We note again that the deposition testimony of Principal Cook and Reilly included numerous questions regarding hypothetical situations that asked these witnesses to determine whether they would permit certain presentations on religious topics and if not, how those presentations differed from others that were permitted. While we have considered the testimony on these topics, we will not make legal determinations based on witness's opinions in response to hypothetical questions. We decide the equal protection claim based only on the actual occurrences in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 05-CV-2094

DONNA KAY BUSCH, in her individual capacity and as the parent and next friend of Wesley Busch, a minor,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*

ORDER

AND NOW, this 31st day of May, 2007, upon consideration of Plaintiff Donna Kay Busch's Motion For Partial Summary Judgment (Doc. No. 20), Defendants Marple Newtown School District, Marple Newtown School District Board of Directors, Robert Mesaros, and Thomas Cook's Cross-Motion For Summary Judgment (Doc. No. 19), and all papers submitted in support thereof and in opposition thereto, it is ORDERED as follows:

1. Plaintiff's Motion for Summary Judgment (Doc. No. 20) is DENIED.
2. Defendants' Motion for Summary Judgment (Doc. No. 19) is GRANTED.
3. Judgment is entered in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick
R. Barclay Surrick, Judge

No. 09-315

Supreme Court, U.S
FILED
NOV 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONNA KAY BUSCH, In Her Individual Capacity
And As The Parent And Next Friend
Of Wesley Busch, A Minor,

Petitioner,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, MARPLE NEWTOWN SCHOOL DISTRICT BOARD OF DIRECTORS, ROBERT MESAROS, Former Superintendent Of The Marple Newtown School District, And THOMAS COOK, Principal Of Culbertson Elementary School,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the petition for a writ of certiorari must be denied because petitioner has demonstrated no compelling reasons to grant certiorari with respect to the Third Circuit's decision that a School District may lawfully prevent a parent who is invited to share a story as part of her five-year-old son's curriculum-based show-and-tell activity from reading Bible verses aloud to a captive audience of kindergarten students in a public school classroom during class?

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RULE

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This case involves the unlawful effort of petitioner Donna Kay Busch (Busch), an Evangelical Christian,[1] to read aloud from the Bible to a class of public school kindergarten students during a curriculum-based exercise for her son Wesley Busch's "All About Me" week.

Ironically, this case is not at all about Wesley – it is all about Busch. Busch's mission – to spread what she believes to be the literal word of God to as many people as possible – is clear and, to some, quite commendable. Equally clear is the law – it is lawful under the

[1] Busch describes herself as an Evangelical Christian who "received Christ as [her] Savior" in 1987. C.A. App. at 1557 & 1234. Since she was a young girl, Busch has believed that the Bible is the literal word of God. C.A. App. at 1362. Eric Busch, her husband, described an Evangelical as "one who brings God's word to the world." According to religion expert Brian Ortale:

> The Evangelical Christian believes in the power of the word of God to reveal God and to make God present in the reading or preaching of the word and in the heart, mind and soul of anyone who hears the word of God. This is, again, what Martin Luther understood to be the power of the word of God to bring one to faith. Hearing or reading the word brings one to faith and faith brings one to salvation. Evangelical Christians believe not only in the power of the word but in the mission to proclaim the word of God to the world. * * * The Evangelical Christian believes salvation and entrance into the kingdom of God is to be accomplished by spreading the good news that Jesus has redeemed God's people. God saved the world through the death and resurrection of God's son Jesus and Evangelical Christians believe it is the mission of the church to proclaim this message so that all people might come to faith in Jesus Christ and be saved.

C.A. App. at 0131 & 0814-0825.

circumstances presented for a school district to prevent Busch or any other adult from reading the Bible or any other religious text aloud to a captive audience of kindergarten students as part of a curriculum-based activity in a Pennsylvania public school classroom.

COUNTERSTATEMENT OF THE CASE

A. Five-Year-Old Wesley Busch And His "All About Me" Week

During the 2004-2005 school year, Wesley was a five-year-old kindergarten student at Culbertson Elementary School in the Marple Newtown School District. C.A. App. at 0055-0056. In October of 2004, Wesley participated in his kindergarten show-and-tell activity called "All About Me." "All About Me" is a unit under the School District's kindergarten social studies curriculum. C.A. App. at 1071. Its objectives include that the student will identify individual interests and learn about others. C.A. App. at 1080.

Jaime Reilly, Wesley's kindergarten teacher, distributed a teacher handout (the "All About Me" handout) to parents at Back-to-School Night. C.A. App. at 1085 & 1155-1156. The "All About Me" handout stated, in part:

> Each child will have the opportunity to share information about themselves during their 'All About Me' week. To start off your child's 'All About Me' week please send in a poster with pictures, drawings, or magazine cut outs of your child's family, hobbies, or interests. Your child may bring in a special toy or stuffed animal during the week to introduce to the

> class. Your child may also bring in a favorite snack to share with the class during their 'All About Me' week.

The "All About Me" handout also contained a general invitation to parents:

> If any parent would like to come to school to share a talent, short game, small craft or story with us during your child's 'All About Me' week please contact me 1 week in advance to schedule a day and time.

Culbertson Elementary asked parents to call a week ahead so that the school would know what the parent intended to present. C.A. App. at 1008-1009. Busch did not attend the Back-to-School Night for Wesley's kindergarten class, so Reilly gave her the "All About Me" handout soon after that event. C.A. App. at 0134.

Busch admits that the "All About Me" handout did not say that the School District gives the right to the child to pick his favorite book and have his parent read it aloud to the class. C.A. App. at 1195. She further admits that she could not point to anything in writing that she ever received from the School District which said that, as part of the "All About Me" classroom exercise, the student is invited to pick his favorite book and have the parent read it aloud to the class. C.A. App. at 1195-1196.

B. Wesley Participates In His "All About Me" Week By Making A Poster With A Picture Of A Church With "I Love To Go To The House Of The Lord" Written Under It And Presenting His Poster To His Kindergarten Classmates.

Wesley in fact participated in his "All About Me" week exercise by making a poster with his mother that included photographs of himself with his hamster, his brothers, his parents, his best friend at the time, and a picture of a church cut out from construction paper. Third Circuit Opinion, Pet. App. at 5a; C.A. App. at 1211. At Wesley's request, Busch wrote under the picture of the church: "I love to go to the House of the Lord" or "I like to go to church" or "something like that." Third Circuit Opinion, Pet. App. 5a; C.A. App. at 1216. Culbertson Elementary displayed Wesley's poster on his classroom wall, and his mother remembers seeing it there. C.A. App. at 1081 & 1218. Wesley, like his classmates, had the opportunity to present his poster to the class and talk about the various items on it, including the picture of the church. C.A. App. at 1082.

C. Busch Tries To Make Wesley's "All About Me" Week "All About Her."

Despite the unequivocal language of the written "All About Me" hand-out inviting parents to, among other things, share "a story," Busch claims that she was invited to share Wesley's "favorite book" with his class. Busch testified that she visited Culbertson to meet with Reilly about one week before Wesley's "All About Me" week. C.A. App. at 1176. Busch stated that her purpose

was "[t]o find out about what, you know, the Me Week, what I needed to do for his Me Week." C.A. App. at 1181-1182. Busch claims that Reilly told her that she could come in and read Wesley's favorite book. C.A. App. at 1198. Reilly does not recall having any such conversation, and there is no record of Busch signing in at the visitors' desk as she had done before. C.A. App. at 1110. In either case, Busch admits that before showing up in Reilly's classroom on the date of the actual classroom incident, she never told Reilly that she intended to read aloud from the Bible. C.A. App. at 1227-1228. Busch further admits that the verbal invitation that she claimed Reilly had made to her to come in and read from Wesley's favorite book carried with it the restrictions that the law would place upon what one could read to the kindergarten class. C.A. App. at 1207-1208.

Busch testified that a week or so before the actual classroom incident, she said to Wesley, "something . . . like your teacher, you know, said I could come in and read your favorite book. Which book do you want me to take in?" C.A. App. at 1174. She claims that Wesley said, "the Bible."[2] C.A. App. at 1174. Wesley and Busch then

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[2] Wesley's babysitter and friend of the Busch family, Judy Harper (Harper), testified that before he started school, Wesley's favorite book was the Dr. Seuss children's storybook entitled, "*Are You My Mother?*" (Deposition of Judy Harper (Harper Deposition) at 11, lines 10-25). After he started kindergarten, Wesley's favorite book became "*Brown Bear, Brown Bear,*" a children's storybook. (Harper Deposition at 12, lines 11-18; & 12, line 19). Harper testified that she had no reason to believe that the Bible was Wesley's favorite book. (Harper Deposition at 13, lines 16-21).

talked about what he wanted her to make for his favorite treat, and about the poster that he was going to make, and "things like that." C.A. App. at 1174-1175. For Wesley's poster, Busch let him pick out what he wanted to put on it. C.A. App. 1211.

D. It Was Busch – Not Wesley – Who Decided To Read Aloud From The Original King James Version Of The Bible And It Was Busch – Not Wesley – Who Chose To Read Psalm 118.

Yet, it was Busch – not Wesley – who decided to read aloud from the original King James version of the Bible. C.A. App. at 1363. And it was Busch – not Wesley – who decided to read aloud from Psalm 118. C.A. App. at 1247.

Busch testified that she probably made the decision to read aloud from Psalm 118 the night before the actual classroom incident. C.A. App. at 1252. Busch claims to have randomly picked Psalm 118. C.A. App. at 1251-1252. The verses from Psalm 118 which Busch claims she wanted to read provide:

> Psa 118:1 O give thanks unto the LORD; for he is good: because his mercy endureth for ever.
>
> Psa 118:2 Let Israel now say, that his mercy endureth for ever.
>
> Psa 118:3 Let the house of Aaron now say, that his mercy endureth for ever.

> Psa 118:4 Let them now that fear the LORD say, that his mercy endureth for ever.
>
> * * *
>
> Psa 118:14 The LORD is my strength and song, and is become my salvation.

C.A. App. at 0130 & 0708.

Busch admitted that Psalm 118 praises God. C.A. App. at 1375-1376. Religion expert Brian Ortale describes Psalm 118 as a "powerful tool for proselytizing by the Christian community":

> Psalm 118 remains a hymn of thanksgiving to God for God's mercy and God's action on behalf of God's faithful people. However, the specific use of Psalm 118 in the Christian community regards Jesus as the stone refused by the builders. In fact the image of Jesus as the stone refused by the builders is used a number of times in the Bible. Six different passages of the Greek Scriptures contain the image of Jesus as the stone refused by the builders. This multiple use leads one to presume that any reference to Psalm 118 in or by the Christian community would include this particular meaning referring to Jesus as the stone refused by the builders and therefore also the source of salvation from God.

The identification of Jesus as the stone refused by the builders and now the source of salvation from God makes Psalm 118 a powerful tool for proselytizing by the Christian community. The message is that Jesus is the stone rejected by some but exalted by God, the cap stone. Jesus is now the reason behind the utterance of verse 14, *The Lord is my strength and song, and is become my salvation.*[3] Jesus is the LORD. And Jesus is the source of salvation.

The primitive Christian community used the metaphor identifying Jesus with the stone refused by the builders to condemn those who refused faith in Jesus. The reference to Jesus as the stone rejected by the builders become by God the source of salvation was used as a warning to those who were aware of the message of Jesus but did not accept it in faith, did not accept Jesus as Lord and did not receive salvation. This warning to accept salvation carried with it the promise of condemnation, damnation, and eternal suffering for those who did not believe and those who were not saved. It is necessary to acknowledge the caustic nature of the metaphor as it was used to condemn those who did not become members of the primitive Christian community. It is necessary to acknowledge the manner in which it was used

[3] Busch intended to read verse 14.

> by the primitive Christian community and has continued to be used throughout Christian tradition.

C.A. App. at 0131 & 0814-0821.[4]

E. Busch Attempts To Read Bible Verses Aloud To A Captive Audience Of Kindergarten Students In A Public School Classroom During A Curricular Activity.

On October 15, 2004, Busch signed in at Culbertson Elementary, listing "Reading to Children" as the purpose, with "Time In" at 8:56 a.m. and "Time Out" at 9:15 a.m. C.A. App. at 0128 & 0395. When Busch came into the classroom, Reilly was sitting in a rocking chair in the center. C.A. App. at 1262. Busch walked up to Reilly's desk, where she remained standing. C.A. App. at 1262. Busch was holding her Bible, which had a red leather cover and the title, "Holy Bible" on the outside. C.A. App. at 1263.

Busch testified that she stooped down next to Reilly and said something like, "whenever you're ready, let me know," and she told Reilly she wanted to read from Psalm 118. C.A. App. at 1263-1264. Reilly said "Oh" and

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[4] The School District's Reading Supervisor conducted a readability study of the passage from the Bible which Busch planned to read aloud to the kindergarten class. C.A. App. at 0938-0939, 0130 & 0709. A readability study determines the reading level of the text or selection. C.A. App. at 0938. According to this study, "[u]sing the *King James Version*, the grade level readability of Psalm 118 is 7th grade." C.A. App. at 0130 & 0709.

when Busch asked whether that would be okay, Reilly[5] said she would have to ask Principal Thomas Cook (Cook).[6] C.A. App. at 1264. Busch's desire to read from Psalm 118 caused Reilly concern because, in her opinion, reading aloud from the Bible under these circumstances would be religious expression. C.A. App. at 1098.

Reilly went "pretty immediately" out into the hallway. C.A. App. at 1269. Busch saw Reilly speak with Cook in the hallway right outside the door. C.A. App. at 1269. After Reilly and Cook were finished talking, Reilly came back into the classroom and told Busch that Cook would like to speak with her. C.A. App. at 1272. Reilly never told Busch that she could not read aloud from the Bible. C.A. App. at 1275.

Busch went to speak with Cook outside the door in the hallway. C.A. App. at 1275. According to Busch, Cook told her that she cannot read aloud from the Bible because "it's against the law of separation of church and state and we can't let that kind of thing happen in his school." C.A. App. at 1276-1277. Busch said that Cook used the word "proselytizing." C.A. App. at 1278. Busch understood Cook to be "saying I couldn't try to convert souls." C.A. App. at 1280.

While Cook and Busch were in the hall talking, Reilly attended to the children. C.A. App. at 1112. After that, Busch came back into the classroom and asked Reilly if she had something else that she could read to the

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[5] Reilly is of the Christian faith. C.A. App. at 0136.

[6] Cook has served as assisting minister in the Christian faith since approximately 1985. C.A. App. at 0133.

children. C.A. App. at 1111. Reilly offered Busch a Halloween book. C.A. App. at 1294. Busch told Reilly that she did not "believe in that. I won't read that."[7] C.A. App. at 1295. Reilly said, "Okay, I will find you another one," and she found a book on counting, which Busch then read. C.A. App. at 1295-1296.

Superintendent Robert Mesaros (Mesaros) testified that he supported Cook's decision because "reading from sacred scripture, in this case the Bible, to a captive audience of students would be a violation of the school code and the district policy." C.A. App. at 0889. Mesaros testified that it was important for the teacher, the principal and the District to protect the students from an intervention, regardless of how meaningful these activities are to Busch and her family. C.A. App. at 0891.

F. Busch Testifies That Parents Had The Right To Read Verses Praising Satan, And Books Advocating Nazism, The Killing Of All Christians And Communism To Wesley And His Kindergarten Classmates In Their Public School Classroom As Long As It Related To Their Child – And Her Counsel Agreed At Oral Argument.

Busch testified that the District would violate a parent's freedom of religion or speech if it prohibited the parent's attempt to read something about Satan to

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[7] Busch believes that Halloween is a "byproduct" of witchcraft. C.A. App. at 1298. Busch told Harper that she believes that Halloween is Satan, and that Culbertson's Pumpkin Festival is related to Satan. (Harper Deposition at 17, lines 19-25; & 18, line 2).

the class. C.A. App. at 1410-1411. Eric Busch, her husband, testified that he agreed with his wife that it would be lawful for a parent to read the words "O give thanks unto *Satan*; for he is good: because his mercy endureth for ever" to the kindergarten class in a public school classroom '[i]n the context of "Me Week" where the child is picking his favorite book . . . .' C.A. App. at 1628-1629. In Busch's opinion, the District created an opportunity for a child to pick and a parent to read to the rest of the class a book which advocates Nazism, the killing of all Christians or communism. C.A. App. at 1412.[8]

Busch's counsel echoed Busch's all-or-nothing stance at oral argument before the Third Circuit:

> At her deposition, Busch testified that the school would not be able to restrict a parent in Wesley's class who, as part of his or her child's "All About Me" week, wished to read material advocating extreme violence and discrimination. We think it is fair to discount these statements, which were elicited by opposing counsel's pointed questioning. When presented with less provocative hypothetical scenarios at oral argument on this appeal, however, Busch's attorney similarly asserted that no line drawing by the school would have been permissible so long as a parent's

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[8] In Busch's opinion, the only subject matter the School District did not open up the opportunity for a child to pick and a parent to read from to the class, would be sexual content. C.A. App. at 1413.

> message related to his or her child. The gist of Busch's testimony and counsel's argument is that Busch believes schools must choose between allowing all invited parent speech or allowing none at all.

Pet. App. at 17a n.9.

It is this Pandora's box that Busch invites the United States Supreme Court to open.

G. Busch Files Suit, And The District Court Enters Summary Judgment In Favor Of Respondents On All Claims.

On May 2, 2005, Busch, individually and as Wesley's parent, filed suit[9] against the Marple Newtown School District, its School Board, its then Superintendent, and the principal of Culbertson Elementary School based on Cook's request that Busch not read aloud from the Bible to a classroom of public school kindergarten students during a curriculum-based classroom exercise. C.A. App. at 0051-0066. On cross-motions for summary judgment, the district court granted summary judgment in favor of respondents on all claims. On appeal, the United States Court of Appeals for the Third Circuit affirmed.

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[9] In her Complaint, Busch sought relief for alleged violations of the Free Speech, Establishment and Equal Protection Clauses, and the Pennsylvania Constitution. C.A. App. at 0051-0066. Busch's Petition is limited to her alleged free speech claim. Petition at 7 n.2.

H. The Third Circuit Affirms The District Court's Order.

In its Opinion, the Third Circuit stressed from the outset that the elementary school setting – "particularly the kindergarten classroom" – is a unique forum for considering competing First Amendment and pedagogical interests. Noting that public schools may at certain times take on the characteristics of public fora by intentionally opening up their facilities for public discourse, the Third Circuit distinguished traditional classroom activities from that category: "But in classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved. Speech occurring during these activities may be regulated under standards different from those that would apply in public fora." Pet. App. at 12a.

Relying on its prior decision in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003), the Third Circuit explained that, in the elementary school classroom, the appropriateness of student expression depends on several factors, including the type of speech, the age of the speaker and audience, the school's control over the activity in which the expressions occurs, and whether the school solicits individual views from students during the activity. *Id.*, *citing Walz*, 342 F.3d at 278. "'[T]he age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise.'" *Id.*, *quoting Walz*, 342 F.3d at 276.

According to the Court, unlike high school students, for elementary school students, the line between school-endorsed speech and merely allowable speech is blurred, "'not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals.'" *Id. at 13a, quoting Walz*, 342 F.3d at 277. As a result, restrictions on speech during a school's organized curricular activities are within the school's legitimate area of control because they help create the structured environment in which they school imparts basic social, behavioral and academic lessons. "'The curricular standards applied during these activities, 'especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned.'" *Id.*

Noting that some classroom discussion of religion or religious practices may be consistent with appropriate curricular standards, the Third Circuit recognized that "classroom speech promoting religion or specific religious messages presents special problems for educators." *Id.* The Third Circuit stated that whether a school solicits speech from students helps determine whether student speech is consistent with the school's pedagogical goals. "But the fact the speech was invited during a curricular activity does not necessarily prevent the school from limiting the student's response." *Id.* at 14a. According to the Court, the school may properly require, for example, that the solicited speech respond to the subject matter at hand, and may require that classroom responses conform to the mode of presentation requested.

Turning to the issue of parent participation in curricular activities, the Third Circuit maintained:

> Likewise, when parents participate in an elementary school's curricular activities, the school may impose the same requirement-that they refrain from promoting specific messages in class. The school's pedagogical considerations are present, and are perhaps heightened, when a parent is the speaker because parents, much like teachers, are typically held in high regard and viewed as authoritative by young children. By inviting participation in curricular activities, educators do not cede control over the message and content of the subject matt . presented in the classroom. Were teachers or school administrators required to do so, individual students or parents could use the classroom to promote any message in the guise of a pedagogically approved curricular activity.

Id. at 15a. The Third Circuit also stressed that educators should be free to seek appropriate ways to encourage parent participation in the education of their children. *Id.* The Court was concerned that such efforts could be jeopardized if, once invited to share details about their family experience, parents could express any message of their choosing as long as it related in some way to their child. According to the Third Circuit, "[i]n the elementary school setting, and particularly at the kindergarten level, educators would face the dilemma of either foregoing valuable curricular activities or foregoing the ability to control the pedagogical direction of their classrooms." *Id.* at 16a.

Applying these principles to the facts before it, the Third Circuit found that Busch attempted to read aloud Bible passages to students in a kindergarten classroom with the teacher present as part of a curricular exercise. The Court also noted that, in this context, the school was concerned that she would "'promote a religious message through the channel of a benign classroom activity.'" *Id.*, *quoting Walz*, 342 F.3d at 280.

The Court rejected Busch's argument that the nature of the "All About Me" activity altered the context of the speech in two ways. With respect to the first, Busch argued that the activity's focus on Wesley during his "All About Me" week prevented any perception of school endorsement. Noting that show-and-tell type exercises – commonplace in elementary school curricula – are valuable pedagogical tools for furthering the behavioral and social development of children, the Third Circuit stressed that "like other curricular activities in the kindergarten classroom, 'show and tell' assignments generally presume the school may limit the content of the presentations." *Id.* at 16a. The Court also stressed that, unlike in *Walz*, the speaker here was not a student. "That it was a student's parent further blurs 'the line between school-endorsed speech and merely allowable speech.'" *Id.* at 17a, *quoting Walz*, 342 F.3d at 277.

The Third Circuit also rejected Busch's second argument – that the statement in *Walz* that "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected" – supports her contention that her speech should have been permitted because she intended to express a solicited view on the pertinent

subject matter. Put another way, Busch maintained that Culbertson Elementary invited her to participate in Wesley's "All About Me" week, where "all about Wesley" was the subject matter, and she intended to present a viewpoint about Wesley. Busch therefore contends that once she was invited to speak, any restriction on her speech was impermissible as long as her speech was about Wesley. The Court wisely rejected this untenable position:

> The school need not choose, however, between soliciting information about students as part of curricular activities and opening the classroom to any content the speaker chooses to disseminate. In crafting a curriculum, school officials face the sensitive task of exposing children to diverse traditions and cultural experiences while also remaining mindful of the expectations and rights of the children and their parents. Principal Cook disallowed a reading from holy scripture because he believed it proselytized a specific religious point of view. As in *Walz*, the school's reasons – to prevent promotion of a religious message in kindergarten – were "designed to prevent . . . speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." *Id.* at 280.

Id. at 17a-18a.

The Third Circuit also rejected Busch's argument that Culbertson Elementary's restriction on her speech was unrelated to the legitimate purpose of avoiding promotion of religious messages generally but was instead motivated by its desire to censor her and Wesley's particular religious beliefs. According to the Third Circuit:

> But the unchallenged record demonstrates the school permitted Wesley, in the classroom and as part of his "All About Me" week, to express his religious belief. These beliefs were featured on his "All About Me" poster as a depiction of a church and a statement expressing that he likes to attend church. Wesley was permitted, as other students were, to present his poster to the class in the manner he desired. Accordingly, the school's actions do not appear to have been motivated by discrimination against Wesley's religion. Rather, the school identified a significant difference between the identification of religious belief and certain holiday-oriented religious materials, on the one hand, and a parent's reading of holy scripture, on the other hand, which it considered a form of proselytizing.
>
> It may be reasonably argued that a mother's reading of the Bible to a kindergarten class, especially sublime verses from the Book of Psalms, should be permitted. In this sense and for many, the conduct is benign and the message inspiring. But a

reading from the Bible or other religious text is more than a message and unquestionably conveys a strong sense of spiritual and moral authority. In this case, the audience is involuntary and very young. Parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult's reading of religious texts.

The dilemma here is that our jurisprudence seeks to affirm the right of individuals to identify and practice their religion and at the same time to forestall the establishment of religion. In this case, as in many others, these fundamental principles are in tension with one another. Often a vehicle of religious practice, speech is sometimes undertaken in private, sometimes in a group, and sometimes, as here, in a public school. The public school setting may implicate the Establishment Clause, especially where public authority undertakes or is reasonably perceived to have undertaken to give one religious belief official approval or approval over other religious beliefs. And this tension is particularly vexing in a public school where attendance is compulsory and moral and social values are being developed along with basic learning skills. In seeking to address that tension, elementary school administrators and teachers should be given latitude within a range of reasonableness related to preserving the school's educational goals. *See Hazelwood*

> *Sch. Dist.*, 484 U.S. at 273, 108 S.Ct. 562; *Walz*, 342 F.3d at 277-78, 280-281. In this case, the school's actions were not unreasonable.

Id. at 19a-20a.

The Third Circuit affirmed the Order of the lower court.

I. Busch Files A Petition For A Writ Of Certiorari.

On September 9, 2009, Busch filed the present Petition for a Writ of Certiorari. In her Petition, Busch seeks certiorari review of the alleged issue of "[w]hether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the 'reasonableness' of the restriction, rather than a compelling interest."

As more fully set forth below, the Third Circuit did not hold that respondents had engaged in viewpoint discrimination, or even address such an issue in dictum. Accordingly, the standard to be applied in such a case is the proper subject of law review commentary and scholarly debate, not certiorari review under well-established case law.

REASONS FOR DENYING THE PETITION

A. The Petition Must Be Denied Because It Fails To Present Compelling Reasons For Certiorari Review By This Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.*

Here, Busch purports to base her Petition on subsection (a) of Rule 10, that is, that the Third Circuit allegedly "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ."

As more fully set forth below, Busch has failed to identify the decision of another United States court of appeals on the same important matter decided by the Third Circuit in this case. Rather, her Petition purports to rely on an alleged split of authority in the courts of appeals on an issue which was neither discussed by the Third Circuit nor a basis for its holding.

Because the Petition fails to set forth compelling reasons why Busch's petition for a writ of certiorari should be granted, it must be denied.

1. The Petition Improperly Seeks An Advisory Opinion And Also Runs Afoul Of Several Fundamental Rules Developed By This Court For Its Own Governance.

The Petition characterizes the question presented for review as:

> Whether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the "reasonableness" of the restriction, rather than a compelling interest?

Yet, the Third Circuit did not address – either in its majority opinion or in dictum[10] – the alleged issue of viewpoint discrimination or the standards applicable to such a case. Judge Hardiman candidly acknowledged this fact in his Dissenting and Concurring Opinion:

> The Supreme Court has consistently considered two important questions in Free Speech Clause cases involving private speech: (1) whether the state's regulation of speech is based on subject matter or viewpoint; and (2) whether the speech being regulated takes place in a public forum, a limited public forum, or a nonpublic forum. ***The majority does not discuss the first question.***

Pet. App. at 24a (emphasis added).

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[10] Even dictum would be an insufficient basis for certiorari review. *See Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 379 (1994)("It is to the holdings of . . . cases, rather than their dicta, that we must attend . . . .").

Absent a ruling by the Third Circuit on the question presented for review, the Petition improperly seeks an advisory opinion from this Court,

> which a federal court should never issue at all, see *Hayburn's Case*, 2 Dall. 408, 1 L.Ed. 436 (1792), and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non* advisory opinions, see, *e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

City of Chicago v. Morales, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting).

The Petition also runs afoul of several fundamental rules developed by this Court for its own governance "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision," including:

> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899; *Abrams v. Van Schaick*, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278; *Wilshire Oil Co. v. United States*, 295 U.S. 100, 55 S.Ct. 673, 79 L.Ed. 1329. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely

> necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482.
>
> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, supra. Compare *Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169-172, 48 S.Ct. 66, 72 L.Ed. 218.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Because the Petition seeks an advisory opinion on a constitutional issue, requests the Court to anticipate a question of constitutional law in advance of the necessity of deciding it and asks the Court to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, it must be denied.

2. The Petition Fails To Demonstrate Any Conflict Among The Circuits On The Issue Actually Decided By The Court Of Appeals Below.

The Petition fails to cite any case other than the present that addresses the unique issue decided by the Court of Appeals below – whether a School District may lawfully prevent a parent who is invited to share a story as part of her five-year-old son's curriculum-based show-

and-tell activity from reading Bible verses aloud to a captive audience of kindergarten students in a public school classroom during class.

Absent another case on point, there is no conflict among the circuits, much less a split. Because there is no split among the circuits on the specific issue decided below, the Petition must be denied for this reason as well.

3. The Cases Cited By Busch In Alleged Support Of Her Petition Are Inapposite.

Not one of the seven cases relied upon by Busch as evincing an alleged "split among the Circuits" involved the unique setting of the public kindergarten classroom in the context of a parent's attempt to read Bible verses aloud to a captive audience of kindergarten students during a curriculum-based activity.

To the contrary, six of the cases cited by Busch were decided in the context of a high school — *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) and *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) involved speech by an *outside entity*; *Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) and *Fleming v. Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002) involved *high school student* speech; and *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000) and *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) involved *high school teacher* speech.

The only case involving a kindergarten student – *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005) – is easily distinguishable both legally and factually from the facts of this case.

In *Peck*, a kindergarten student drew a poster that depicted trees, grass, people recycling and a "robed, praying figure" intended to be Jesus in response to an assignment to create a poster illustrating ways to help the environment. The student's teacher, when hanging all of the students' posters for an environmental assembly, asked a parent volunteer to fold the poster in half so that the portion depicting Jesus was concealed.

Here, unlike the student in *Peck*, it is undisputed that Wesley's expression was honored. Wesley was permitted to share with his class his poster with a church and the words to the effect of "I love to go to the house of the Lord," and his poster was displayed along with those of his classmates.

As more fully set forth above, this case is not all about Wesley – it is all about Busch. Unlike the plaintiff kindergarten student in *Peck*, this case involves a parent who claims that she had the right to read verses from the Bible aloud to a public school classroom of kindergarten students during a curricular activity. *Peck* is therefore inapposite.

B. The Petition Must Be Denied Because It Relies On Mischaracterizations Of The Record And The Holding Below.

The Petition contains numerous mischaracterizations of the record and the holding below,[11] only a few of which respondents will address below.

1. The "All About Me" Written Hand-Out Invited Parents To "Share A . . . Story," Not To Read Their Child's Favorite Book.

Busch's statement that "Ms. Reilly offered Mrs. Busch several suggestions, such as reading Wesley's favorite book, preparing a dessert or snack, or one of the other items identified in the invitation to parents" (Petition at 5) is patently misleading.

"Reading Wesley's favorite book" was not an item identified in the "All About Me" handout distributed to parents. The "All About Me" handout invited Busch and other parents to "share a . . . story." Busch admitted this fact. Busch testified that the "All About Me" handout did not say that the School District gives the right to the child to pick his favorite book and have his parent

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[11] Busch also freely misrepresents the positions of the parties in her Petition. For example, she states in footnote 7: "There is no dispute in this case that Marple Newtown's response to Mrs. Busch's attempted speech constituted viewpoint discrimination." Petition at 23 n.7. The actual record in this case is clear as to the true position of the School District. Further, as the Court of Appeals did not decide the case on this alleged basis, Busch's mischaracterization is misplaced in any event.

read it aloud to the class. C.A. App. at 1195. She further testified that she could not point to anything in writing that she ever received from the School District which said that, as part of the "All About Me" classroom exercise, the student is invited to pick his favorite book and have the parent read it aloud to the class. C.A. App. at 1195-1196.

2. Busch's Mischaracterization Of The Third Circuit's Alleged Holding Is Contradicted Within Her Own Petition.

In the section captioned "Reasons for Granting the Petition," Busch describes the holding of the Court below as follows:

> A divided Third Circuit panel held in this case that a public school may engage in viewpoint-related discrimination so long as the school's justification falls within a "range of reasonableness related to preserving the school's educational goals." Pet. App. 20a.

Petition at 11. Similarly, within the Argument section of the Petition, Busch states:

> In addition to the Third Circuit below, which sanctioned viewpoint discrimination by a public school where the restriction was "within a range of reasonableness related to preserving the school's educational goals . . . ."

Petition at 15.

Yet, it is undisputed by both Busch and Judge Hardiman that the Third Circuit did *not* address the alleged issue of viewpoint discrimination in the majority Opinion:

> Judge Hardiman dissented. He first criticized the majority's failure to distinguish between content and viewpoint discrimination.

Petition at 10.

According to Judge Hardiman:

> The Supreme Court has consistently considered two important questions in Free Speech Clause cases involving private speech: (1) whether the state's regulation of speech is based on subject matter or viewpoint; and (2) whether the speech being regulated takes place in a public forum, a limited public forum, or a nonpublic forum. ***The majority does not discuss the first question***.

Pet. App. at 24a (emphasis added).

It is difficult to fathom how a Petition for Writ of Certiorari may be based on an alleged issue that the Court of Appeals below did not address. Nonetheless, Busch and her counsel have chosen to burden this Court with such a Petition.

3. Judge Barry's Concern Was With The Efforts Of Litigants Like Busch To Bring First Amendment Challenges To Kindergarten Show-And-Tell Activities, Not, As The Petition Would Suggest, With The Majority's Holding In This Case.

In footnote 3 of the Petition, Busch misleadingly implies that Judge Barry's concurrence was reluctant and based on the necessity of following Third Circuit precedent:

> Judge Barry concurred, observing that she found "something unsettling about this case and others like it" but nevertheless joined the majority opinion because it "correctly applie[d] Third Circuit precedent." Pet. App. 24a (Barry, J., concurring).

Petition at 10 n.3. Reviewed in its actual context, it is clear that Judge Barry was concerned by the efforts of litigants like Busch to thrust themselves (and the federal courts) into the kindergarten public school classroom in furtherance of their own (and others') agendas:

> We have observed that "at a certain point, a school child is so young that it might reasonably be presumed" that the First Amendment does not protect that child's speech. *Walker-Serrano by Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003). We have also observed that "[w]here that point falls is subject to reasonable debate." *Id.*

It cannot seriously be a subject of reasonable debate that "that point" is kindergarten. I say this not because Wesley, then age five, could neither read nor write and not because I take issue with his mother's claim that the Bible is Wesley's favorite book and not because, at least in my view, Wesley and his kindergarten classmates would have been unable to understand the excerpts from Psalm 118 that his mother sought to read on his behalf, excerpts which tell us what Israel and the House of Aaron say about the Lord's mercy and note the concept of salvation, a concept I note has been the subject of discussion and debate among biblical scholar for centuries. I say that "that point" is kindergarten because children of kindergarten age are simply too young and the responsibilities of their teachers too special to elevate to a constitutional dispute cognizable in federal court any disagreement over what a child can and cannot say and can and cannot do and what a classmate can and cannot be subjected to by that child or his or her champion.

We send our littlest ones off to school worrying about them and hoping no harm will come to them, but confident in the knowledge that they will be protected and guided and, yes, nurtured by their teachers, who are our surrogates while our children are away. And so I write because I find something unsettling about this case and others like it which, while

> recognizing the crucial importance of age in determining the extent of the First Amendment's protections, have not – at least, not yet – carved out an exception for the little ones but, rather, continue to scrutinize and analyze purported violations of the First Amendment rights of children at the pre-K and kindergarten levels. I nonetheless join Chief Judge Scirica's excellent Opinion because it correctly applies our precedent to the issues before us. Perhaps our next case will tweak that precedent just slightly to accommodate my concerns.

Pet. App. at 23a-24a.

4. Many Statements Of Alleged Fact Set Forth In the Petition Are Not Supported By The Cited Record.

The Petition plays fast and loose with the alleged facts of record. For example:

a. The Petition states at p. 4:

> "According to Wesley, the time he shares with his mother reading the Bible is special to him. *Id.* at 1639."

The Record reveals:

> Wesley did not testify in this case. The cited reference to the record is from his father's deposition, and does not support the statement in the Petition.

b. The Petition states at p. 4:

"At the time of the incident giving rise to this lawsuit, Wesley considered the Bible his favorite book. *Ibid.*"

The Record reveals:

Wesley did not testify in this case. The cited reference to the record is from his father's deposition, and does not support the statement in the Petition.

c. The Petition states at p. 6:

"Mrs. Busch intended to introduce herself to the students and explain that she was there for Wesley's 'All About Me' week, and that Wesley had asked her to read the Bible, his favorite book. C.A. App. 1478."

The Record reveals:

The cited reference to the record does not support the statement in the Petition. It refers to Busch's deposition, where she was asked whether she knew that the teacher, principal, school board members and others were all of the Christian faith before she filed her Complaint alleging that Culbertson Elementary had "animosity towards Christians" and "struggles with the Christian faith."

There are many other statements of alleged fact in the Petition which are not supported by the cited record and which are too numerous to cite here. Clearly, unsupported statements in the Petition cannot form the basis for certiorari review by this Court.

C. That The Third Circuit's Decision Is Allegedly "Erroneous" Is Not A Basis For Certiorari.

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. S. Ct. R. 10.

In Section B of the Argument Section of the Petition, Busch states that "[t]he Court of Appeals Decision Is Erroneous." The assertion of alleged error is not a basis for review on certiorari. *See* U.S. S. Ct. R. 10.

In addition, Busch's desperate reliance on the same worn-out mischaracterization of the Third Circuit's decision – "The Third Circuit erred in holding that Marple Newtown's viewpoint-based restriction of the speech here was permissible because it was 'within a range of reasonableness related to preserving the school's educational goals'" – must be rejected. A blatant mischaracterization of the holding of the Court of Appeals cannot form the basis for certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF OF PETITIONER

INTRODUCTION

Stripped of rhetoric, insinuation, and other distractions unrelated to the question that Mrs. Busch presented to this Court, respondents' opposition rests on two unpersuasive arguments. First, they assert that the majority below did not address the "issue of viewpoint discrimination or the standards applicable to such a case." Second, they allege that the clear circuit split identified in the Petition is not implicated here. As to the first argument, the "issue of viewpoint discrimination" was never in doubt before the Third Circuit: the district court found that respondents' regulation of Mrs. Busch's speech con-

stituted viewpoint-based discrimination; respondents did not challenge this conclusion before the Third Circuit; and the majority opinion upholding the discriminatory action as within a "range of reasonableness" reflects this undisputed conclusion.

As to the second argument, by upholding respondents' actions, the majority joined two other circuits that, in the wake of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), have erroneously permitted schools to regulate invited speech on the basis of viewpoint so long as such restrictions are reasonably related to pedagogical objectives—notwithstanding this Court's longstanding precedent requiring *all* viewpoint-related regulation of speech to be based on a compelling interest. To avoid this clear implication, respondents offer a construction of the Third Circuit's holding so tortuously narrow that to recite it is to demonstrate the baselessness of respondents' argument. The panel's decision resolved which standard the Third Circuit will apply to future viewpoint-based restrictions of invited speech, adding to a growing split that now reaches six circuits. This case presents a clear opportunity for the Court to settle that dispute.

ARGUMENT IN REPLY

A. Respondents' Factual Mischaracterizations

The vast majority of respondents' opposition is an exercise in diversion, setting forth a lengthy "Counterstatement of the Case" and advancing specious allegations that the Petition mischaracterizes the record below. While most of these inaccurate assertions are immaterial to the issues presented in the Petition, one merits discussion because it underlies

respondents' flawed legal analysis: respondents' repeated insistence that Mrs. Busch's intended participation in her son's class was a pretext for proselytizing. This insinuation reverberates throughout the opposition, starting from the very first sentence, which conspicuously identifies Mrs. Busch as an Evangelical Christian. Br. in Opp. 1. The opposition then provides a lengthy footnote containing the views of a "religion expert" who purports to know the true motives of all Evangelical Christians as they go about their daily activities. Respondents suggest Mrs. Busch intended to proselytize because "[t]he Evangelical Christian believes in the power of the Word of God to reveal God and to make God present in the reading or preaching of the word and in the heart, mind and soul of anyone who hears the word of God." *Id.* at 1 n.1. Accordingly, respondents state Mrs. Busch's "mission" is "clear": "to spread what she believes to be the literal word of God to as many people as possible." *Id.* at 1. Citing the extensive views of the same "religion expert," respondents subsequently describe Psalm 118 as a "powerful tool for proselytizing." *Id.* at 7-9.

Respondents' attack on Mrs. Busch's motive is groundless. As an initial matter, because this case was decided on summary judgment, respondents' purported expert was never subjected to *voir dire*, and the district court did not determine whether he was qualified to offer opinion testimony under Federal Rule of Evidence 702. More significant, the Third Circuit did not make any reference to these "expert" views in its decision. What the Third Circuit *did* recognize is that Wesley Busch and his mother routinely read the Bible together at breakfast and before going to bed, and that Wesley often carries the Bible with him. Pet. App. 4a. It was thus natural

that Wesley would want to share this special experience during his "All About Me" week; and, as the Third Circuit observed, it was Wesley who asked his mother to read the Bible, after Mrs. Busch told Wesley his teacher had permitted her to read his favorite book to his class. Pet. App. 6a. Contrary to respondents' repeated insinuations, Mrs. Busch did not choose Psalm 118 to proselytize. Indeed, having been asked by Wesley to read the Bible in response to respondents' invitation for his favorite book, Mrs. Busch scrupulously avoided selecting a passage that referred to Jesus, which she believed might upset some people; she instead chose Psalm 118, because she and Wesley frequently read from Psalms and she thought the children would like Psalms, which resembled poetry. Pet. App. 6a.

Respondents' aim in attempting to recast the facts is clear: to belittle and malign Mrs. Busch as a religious zealot, and, more important, to obscure the central and unchallenged finding that respondents' regulation of Mrs. Busch's attempt to read Psalm 118 constituted viewpoint-based discrimination.[1] Mrs. Busch sought to share an activity that was meaningful to Wesley—one that respondents invited, one that he selected, one that was entirely appropriate in the context of the "All About Me" assignment, and

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[1] Respondents' disingenuous rhetoric goes so far as to suggest that Mrs. Busch believes parents have the right to read verses praising Satan, advocating Nazism, and the killing of all Christians. Br. in Opp 11-13. But to the extent her responses suggest that she is asking this Court to open a "Pandora's box," *id.* at 13, the fact is that this box is already open: three circuits have held that viewpoint-based regulation of speech cannot be based on "reasonableness" or "pedagogical objectives" but instead requires a compelling interest. *See* Pet. at 13-15. This is the same holding Mrs. Busch seeks from this Court.

one that was ultimately prohibited simply because of, in the Third Circuit's words, its "specific message." Pet. App. 15a.

B. Respondents' Flawed Legal Arguments

1. The Third Circuit Addressed Both the Issue of Viewpoint Discrimination and the Applicable Standards in Such a Case.

Respondents tersely contend that the Third Circuit "did not address" the issues of "viewpoint discrimination or the standards applicable to such a case." Br. at 23. The only support they provide for this proposition is Judge Hardiman's statement in dissent that the majority did not discuss whether respondents' regulation of Mrs. Busch's speech was "based on subject matter or viewpoint." *See id.* at 23, 29-30. Respondents read far too much into this observation, however. To the extent the majority did not discuss the distinction between content and viewpoint restrictions, that is only because no discussion was necessary: the majority began from the premise—found by the district court and unchallenged by respondents on appeal—that the regulation of Mrs. Busch's speech *did* constitute viewpoint-based restriction. Infusing its opinion with references to viewpoint-based regulation of speech, the majority then held that such restrictions could be upheld if they were "within a range of reasonableness," concluding that respondents' actions were "not unreasonable." Pet. App. 20a. It is this holding that is markedly in contrast to the decisions of three other circuits, while consistent with the decisions of two others, warranting the Court's review.

The district court's finding concerning the nature of the restriction imposed by respondents was unmistakably clear. The district court *agreed* with Mrs. Busch that "the school's action constituted viewpoint discrimination" and that "Principal Cook's explanation for his action indicates that he was motivated by a concern about the religious viewpoint of the material." Pet. App. 60a. The court further observed that respondents "had previously allowed discussions of Hanukkah, Christmas, Passover, and Easter in [the] classroom as part of the regular curriculum"; as such, "the school did not preclude all speech that dealt in any way with religion but precluded speech in this situation because it expressed a religious viewpoint." *Id.* at 60-61. Only then did the court conclude that, based on *Hazelwood*, respondents' viewpoint-based regulation was permissible under a "lower standard" than a compelling-interest standard. Pet. App. 66a.

The district court's conclusion that respondents' regulation constituted viewpoint-based discrimination was not surprising in light of this Court's decisions that discrimination based on the religious character of speech is viewpoint discrimination. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *see also C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting). And, significantly, respondents *never challenged* that finding on appeal. Thus, there was no need for the Third Circuit to compare content-based restrictions to viewpoint-based restrictions, as the district court did initially. The absence of an extensive discussion on a point that was not in controversy should not

come as a surprise to respondents and provides no basis for denying certiorari.[2]

Furthermore, the majority opinion evinces a clear understanding that the restriction was based on viewpoint, for its analysis is couched almost entirely in language denoting a viewpoint rather than subject-based restriction. The panel referred to "speech promoting religion or specific religious messages," Pet. App. 13a, and speech "promoting specific messages," *id.* at 15a. It noted the challenges raised by invited speakers "express[ing] any message of their choosing." *Id.* And it observed that Mrs. Busch's challenge to the speech restriction was based on her prohibited effort "to present a viewpoint about Wesley." *Id.* at 17a. Plainly, the Third Circuit's opinion both contemplated and relied upon the unchallenged premise that the regulation of Mrs. Busch's speech constituted viewpoint-based discrimination.

Operating from that undisputed premise, the Third Circuit then relied on *Hazelwood* and *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003), a case that relied heavily on *Hazelwood*, to hold that the viewpoint-based discrimination was permissible if "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a—language uncannily recalling *Hazelwood*'s holding that invited speech may be regulated by a school so long as its "actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 571. In so holding, the Third

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[2] To the contrary, that the viewpoint-based nature of the restriction is undisputed demonstrates that this case provides the Court with an excellent vehicle to resolve the proper standard to apply to such restrictions in the context of invited school speech.

Circuit squarely aligned itself with those circuits that have interpreted *Hazelwood* to permit viewpoint-based discrimination absent a compelling interest, notwithstanding that this Court has never sanctioned viewpoint-based discrimination using a "reasonableness" standard and that *Hazelwood* did not alter this longstanding precedent. *See* Pet. at 18-22.[3]

That the Third Circuit did not engage in an exhaustive review of authority from other circuits is no barrier to certiorari. The effect of the court's holding is plain: schools may place viewpoint-based restrictions on invited speech based solely on the "reasonableness" of the restriction in relation to pedagogical goals, rather than a compelling interest. This holding is consistent with two other circuits, contrary to three other circuits, and turns, like those decisions, on a reading of *Hazelwood* that is disputed. This Court should intervene to settle this question of exceptional importance.

2. This Case Fits Squarely Within the Circuit Split Identified in the Petition.

Respondents next assert that that the Petition fails to demonstrate a circuit split on the "issue actually decided by the Court of Appeals below" and that the cases cited in the petition evincing this divide are

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[3] Notably, the Third Circuit did not cite any of this well-established authority. Indeed, while the Third Circuit invoked *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 812-13 (1985), for the proposition that public schools may take on the characteristics of a public forum, *see* Pet. App. 11a, the court did not mention *Cornelius*'s equally well-known proposition, squarely applicable here, that the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806.

distinguishable. Br. in Opp. at 25-27. This argument is unavailing.

Respondents' contention rests entirely on their tortuous explanation of the "unique issue" in the case, which they describe as follows: "whether a School District may lawfully prevent a parent who is invited to share a story as part of her five-year-old son's curriculum-based show-and-tell activity from reading Bible verses aloud to a captive audience of kindergarten students in a public school classroom during class." Br. in Opp. at 25-26. To recite this description is to confirm the extent to which respondents must strain to distinguish this case from others in the well-established split.

Respondents' convoluted characterization, moreover, is not only implausible on its face, but disingenuous. Throughout the proceedings below, respondents (and *amici*) have urged that school administrators should be given wide latitude to control their classrooms, particularly kindergarten classrooms. They now suggest, however, that the rule announced by the Third Circuit applies only if the dispute includes all of the following criteria: parents rather than other authority figures, kindergarten classrooms rather than first-grade through twelfth-grade classrooms, five year-olds rather than children of a different age, show-and-tell exercises rather than other invited speech, and Bible reading rather than other expressive activity. Consistent with respondents' support for a broad holding, there is no indication in the Third Circuit's opinion that its decision is limited to the absurdly narrow circumstances respondents now articulate—nor that future cases involving viewpoint-related speech regulation in other factual settings would be decided any differently.

Finally, respondents' effort to distinguish the other cases in the well-recognized split fails. They assert that six cases cited in the Petition were "decided in the context of a high school." Br. in Opp. 26. But respondents provide no explanation why this distinction is material; and, more significant, the holdings of these cases concerning the standard to be applied to viewpoint-related restrictions of invited speech—either compelling-interest or "reasonableness"—did not hinge on any particular facet of the high-school context. This flaw in respondents' argument is confirmed by *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005). There, the Second Circuit engaged in a thorough analysis of the *Hazelwood* question, including a review of many of the cases cited in the Petition, in a case involving a kindergarten student—a review that would have been completely unnecessary if, as respondents suggest, the kindergarten context is a materially distinguishing fact. That court, furthermore, eventually held in *favor* of the kindergarten student after concluding that *Hazelwood* did not *sub silentio* overrule decades of this Court's precedent requiring a compelling interest before imposition of viewpoint-based speech restrictions.

Respondents' only response to *Peck* is wholly unpersuasive: first, they return to their meandering and implausibly narrow characterization of the facts in the instant case; and second, they sidestep the issue completely by maintaining that "Wesley's expression was honored" because a poster Wesley created was displayed. Br. in Opp. 27. But that form of expression has never been at issue. This case is about Mrs. Busch's attempt to read a book that Wesley had selected, after being invited to do so in conformance with a curricular exercise, and then

being prohibited from doing so because it expressed a particular viewpoint. The Third Circuit upheld this restriction because it was "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a. In so doing, the Third Circuit aligned itself with the First and Tenth Circuits and against the Second, Ninth, and Eleventh Circuits on the critical question of how *Hazelwood* has affected this Court's longstanding prohibition against viewpoint-based speech restrictions absent anything less than a compelling interest. This Court should grant certiorari to resolve the split, remain consistent with its well-established precedent, and reverse the decision of the Third Circuit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF INDIAN RIVER SCHOOL DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1. Indian River School District ("Indian River") respectfully moves for leave to file an *amicus curiae* brief in support of Petitioner. All parties have received timely notice of Indian River's intent to file this brief, to which Petitioner has consented. Counsel for Respondents has not consented to Indian River's filing, thus necessitating this motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

2. Indian River is one of the largest school districts in the state of Delaware and includes fifteen different learning institutions. It employs over 600 teachers and provides a public education to more than 8,000 students each year.

3. On a daily basis, the teachers and administrators in Indian River must make decisions that affect the constitutional rights of students and parents. These rights co-exist with the goals behind public education, and it befalls each school district to strike the proper, constitutional balance between these sometimes competing interests.

4. The consequences of uncertainty when striking this balance can be severe. Indian River has experienced first-hand the detriment to public resources and public education that can ensue when there is disagreement regarding how schools should accommodate the rights of Free Speech and Free Exercise.

5. This case concerns when public schools may, may not, or must prohibit religious speech, and Indian River will bear ultimate responsibility for applying these principles to the classroom environment. The question presented directly implicates Indian River's interest in providing its teachers, administrators, and students with guidance as to the proper balance of First Amendment rights and the priorities of public education.

6. For these reasons and those set out in the accompanying brief, Indian River respectfully moves this Court to allow it to file this *amicus curiae* brief urging the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF OF INDIAN RIVER SCHOOL DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Located in Sussex County, Delaware, *Amicus* Indian River School District ("Indian River") is composed of fifteen different learning institutions, including seven elementary schools, three middle schools, two high schools, a magnet school for the arts, and a center for the learning disabled. Indian River is one of the largest school districts in Delaware and employs over 600 teachers. During the 2009-10 school year, Indian River will educate approximately 8,701 students, ranging in age from 5 to 21 years and representing a diversity of backgrounds. *Amicus* knows the costs of weighing these students' constitutional rights. Four years ago, students and parents brought suit against Indian River claiming that religious speech in the classroom

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[1] Pursuant to Supreme Court Rule 37.6, Indian River states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than Indian River, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for all parties received notice at least 10 days prior to the due date of Indian River's intention to file this brief, to which Petitioner has consented. Counsel for Respondents has not consented to this filing, thus necessitating the foregoing motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

violated the First Amendment. That litigation remains pending, and has shown how uncertainty in this area can divide communities and divert public resources away from education. Indian River therefore submits this brief in the interest of seeking greater clarification of the law than the Third Circuit provided.

STATEMENT OF THE CASE

As part of their "All About Me" program, Respondents in this case devoted a week to exploring the interests of each student in Wesley Busch's kindergarten class. Each week, one student could, among other things, invite a parent to read to the class from his or her favorite book. Pet. App. 5a. During his "All About Me" week, Wesley asked his mother to read from the Bible, and she chose five verses from Psalm 118. *Id.* at 6a.

When Wesley's teacher learned of the intended reading, however, she asked Ms. Busch to discuss the matter with the school's principal. In the hallway outside the classroom, the principal informed Ms. Busch that she could not read from the Bible because it would violate "'the law ... of separation of church and state.'" *Id.* at 7a. Ms. Busch read from another book and later brought suit under the First Amendment on behalf of both Wesley and herself. The district court granted Respondents' motion for summary judgment, concluding that, although their "action constituted viewpoint discrimination," it was permissible because it was "reasonably related to legitimate pedagogical concerns." *Id.* at 61a, 71a.

On appeal to the Third Circuit, a divided panel affirmed. The majority held that, "[c]onsistent with [their] pedagogical goals," public schools may "appropriately restrict forms of expression in elementary school classrooms," including Ms. Busch's reading of Wesley's favorite book because of its religious message. *Id.* at 14a. To find otherwise, according to the court, would permit "individual students or parents [to] use the classroom to promote any message in the guise of a pedagogically approved curricular activity" and require educators to "either forego[] valuable curricular activities or forego[] the ability to control the pedagogical direction of their classrooms." *Id.* at 15a, 16a.

The court implicitly rejected the application of heightened scrutiny that applies to viewpoint discrimination, even where speech is otherwise unprotected. Instead, the constitutionality of Respondents' actions depended on an assessment of various factors, including "'the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity.'" *Id.* at 12a (citation omitted). Recognizing the "tension" between several fundamental First Amendment principles, *id.* at 20a, the court ratified the exclusion because the speech would have been "'at cross-purposes with [the school's] educational goal and could appear to bear the school's seal of approval.'" *Id.* at 18a (citation omitted).

SUMMARY OF THE ARGUMENT

The costs of balancing the First Amendment interests in cases involving religious speech in school and the imperatives of public education involve more than abstract ideals. Public resources are diverted from the educational system to support litigation; teachers, students, and communities become divided; and judges become enmeshed in the administration of public education. To prevent such costly disputes, the teachers and school administrators who make daily decisions in the classroom need practical and clear guidance that accurately reflects the legal principles at stake.

The Third Circuit's opinion in this case has obfuscated current law surrounding the fundamental interests of free speech, free exercise, and public education. The Third Circuit sanctioned viewpoint discrimination of religious speech on the grounds that its exclusion was reasonably related to a legitimate pedagogical interest, but failed to provide practical guidance. As a result, teachers, students, and parents will rarely feel certain whether speech is being allowed or prohibited for constitutionally legitimate reasons. Indecision on such matters will cost educators their time, effort, and resources that would be better spent in instruction. In contrast, resolution of the ambiguities created by the Third Circuit's opinion and establishment of clear guidelines will advance the educational process and permit institutions, such as *Amicus*, to focus on their educational mission.

ARGUMENT

I. Essential Public Resources Are Diverted From The Educational Mission Of School Districts When The Law Is Unclear.

As a public educator, Indian River's obligation is not merely to instruct each of its students in the basics of arithmetic and grammar, but to instill fundamental values. To that end, teachers work daily with parents and school administrators to develop curricula that will ensure Indian River's students attain the knowledge, skills, and attitudes needed to realize their potential. These curricula, and the classroom discussions they naturally foster, include matters of both social relevancy and personal import. Indian River also supports a multitude of student groups, and makes its meeting places and other resources available to non-student community organizations.

Amicus is sensitive to the constitutional implications involved in public education. Every day, teachers and administrators must make difficult, on-the-spot decisions that affect the constitutional rights of Indian River's students. Of these, questions regarding religion-oriented speech are among the most challenging. Each decision must properly balance the individual's freedom of speech, the First Amendment's prohibition of state-sponsored religion, and the particular educational objectives at stake, and usually requires split-second evaluation in the demanding environment of the classroom.

In order to make sure that its staff can properly strike this balance, Indian River regularly consults

with outside counsel on legal developments that may affect school curricula. Teachers and administrators also attend educational conferences and panel discussions that focus on First Amendment issues, and new programs are reviewed to ensure they properly take into account both Indian River's academic mission and its students' individual freedoms.

Despite these measures, Indian River has recently experienced the consequences of uncertainty in this area. In *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005), four students and their parents brought suit against Indian River under the First Amendment, alleging, among other things, that classroom references to religion and student organizations that studied religious scripture helped establish a state-sponsored religious presence at certain Indian River schools. That litigation remains pending, and over the last four years has subsumed significant amounts of public funds that would otherwise be dedicated to education, has demanded constant attention from administrators who must oversee fifteen different schools, and has caused rifts in local communities.

Indian River recently revised several policies, including those regarding religious speech at school. Each policy is only as valuable as the extent to which it accurately reflects applicable law. Without straightforward guidance, the teachers and administrators making on-the-spot decisions in the classroom about student speech cannot be certain they are fully respecting the fundamental interests at stake. As the *Dobrich* case has vividly demonstrated for Indian River, the costs of inaccuracy include the

loss of tangible resources. Particularly when religion is involved, every speech-related decision can give rise to heated disputes that redirect valuable public resources from the educational system to the court system.

After revising its policies, Indian River learned of the Third Circuit's opinion in this case and began trying to apply its principles in practice. As set forth more fully below, Indian River believes that the Third Circuit's opinion will create significant confusion and conflict among those who administer and utilize public education. In blurring the scope of fundamentally important constitutional rights that teachers must apply daily, the Third Circuit has overly complicated any attempt to delineate sensible school policy and increased the likelihood of costly litigation at the expense of taxpayers and schoolchildren.

II. The Court Should Grant The Writ Of Certiorari Because The Third Circuit's Decision Will Create Confusion And Conflict In An Area Of Fundamental Constitutional Rights.

The Court should grant certiorari to clarify the important First Amendment issues in this case. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989) (granting certiorari "to clarify the legal standard [for] regulation of the time, place, or manner of protected speech"). As one of nineteen school districts in Delaware, Indian River is responsible for the daily supervision of over 8,000 students who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse

gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). And, as the court of appeals noted, in cases involving religious speech in public schools, fundamental First Amendment principles are often in "tension" with each other. Pet. App. 20a. Indian River's paramount concern is being able to efficiently and accurately determine when the exclusion of religious speech such as Petitioner's is an appropriate classroom regulation, when it is constitutionally compelled, and when it amounts to impermissible viewpoint discrimination. Doing so requires providing school administrators with clear guidance.

1. The Third Circuit's decision fails to provide this guidance because the court did not consider how a school district like *Amicus* should evaluate the other constitutional implications of its conduct. As this Court has noted, "something that is 'quintessentially religious' or 'decidedly religious in nature'" can be properly thought of as "the teaching of morals and character development from a particular viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001). To discriminate between speakers based solely on the religious content of their speech has thus traditionally been considered a form of impermissible viewpoint discrimination, and a school cannot exclude speakers based only on their religious viewpoint. *Id.* at 112; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (finding unconstitutional viewpoint discrimination where a university "selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints").

Moreover, when Indian River opens its schools to outside speakers, it may not select for the content of their messages. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court found impermissible viewpoint discrimination where a school district allowed "school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393; *see also id.* at 392-93 ("[A]ccess to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn ... are viewpoint neutral.").

Similarly, in *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.), the Third Circuit held that an elementary school could not exclude a group of born-again Christians from participating in school-related activities with other community groups, such as posting flyers at the school and distributing them to students. "To exclude a group simply because it is controversial or divisive is viewpoint discrimination" and therefore unconstitutional. *Id.* at 527. This was true even where a group is "attempt[ing] to recruit new members and persuade them to adopt the group's views." *Id.* at 528. *See also C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("The Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination.").

The Third Circuit has also observed that "[i]ndividual student expression that articulates a particular view but that comes in response to a class

assignment or activity would appear to be protected." *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 272, 279 (3d Cir. 2003). To illustrate this point, the court suggested a school could not prohibit "a student in 'show and tell' [from passing] around a Christmas ornament or a dreidel, and describ[ing] what the item means to him" because the student was "expressing himself in the context of a school assignment or activity where the school has sought students' personal views." *Id.* at 278.

But under the Third Circuit's analysis in this case, a series of factors — "'the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity'" — will determine whether the exclusion of religious speech is reasonable and, therefore, constitutionally permissible. The majority opinion simply omitted any discussion of cases like *Lamb's Chapel*, *Good News Club*, and *Child Evangelism*, and offered no explanation for how school districts like Indian River should apply the reasonableness factors or reconcile them with existing First Amendment precedent. While the opinion indicates that schools can prohibit speech because of its religious content, the court failed to do so in a manner that will preempt claims of viewpoint discrimination from those who are restricted from speaking based solely on the content of their message.

2. In addition, the Third Circuit's reliance on this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), fails to explain how school districts must resolve the admitted "tension"

between the different First Amendment rights at stake. *Hazelwood* involved neither religious speech nor the Establishment Clause, and the Court did not have occasion to consider how those interests interact with schools' ability to prohibit speech. In both *Good News Club* and *Lamb's Chapel*, this Court rejected the argument that the speech at issue could be attributed to the school itself. *See Good News Club*, 533 U.S. at 118 (noting the community "could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"); *Lamb's Chapel*, 508 U.S. at 395 (observing "no realistic danger that the community would think that the District was endorsing religion or any particular creed"); *see also Rosenberger*, 515 U.S. at 845 ("To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint."). Likewise, in a case where teachers were distributing religious flyers to elementary students, the Third Circuit previously held that the speech could not be attributed to the school. *Child Evangelism*, 386 F.3d at 531-32.

Without analyzing any of these decisions, the court in this case held that a school district may prohibit religious speech if the message "'could appear to bear the school's seal of approval.'" Pet. App. 18a (citation omitted). This Court has previously rejected similar reasoning. *See Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (holding that a public university could not justify an exclusion of religious speech with concerns about advancing religion). The Third Circuit's failure to directly address the unique First Amendment issues relating to religious speech in public schools further confuses

an already challenging area of fundamental constitutional freedoms, and school districts like Indian River will be less certain that their teachers and administrators are properly balancing students' constitutional rights when making the daily decisions their jobs require.

3. Aside from the Third Circuit's omissions, the substance of the court's opinion is equally bereft of meaningful guidance. The court's attempted distinction between "show and tell," in which there may be a constitutional right to discuss Christmas ornaments and dreidels, and "a school's organized, curricular activities," where such speech may be excluded, is hopelessly imprecise. *See* Pet. App. 13a-14a. Particularly in the elementary school context, teachers and administrators do not merely implement "organized curricular activities," but oversee multi-faceted, year-long programs meant to introduce students to new concepts and enrich their understanding of the world. Blending personal viewpoints is often a cornerstone of the curriculum, and Respondents' "All About Me" program — designed to help children "identify individual interests and learn about others" — is a perfect example. *Id.* at 5a. Particularly where students and parents like Petitioner have been invited to share their interests, consensus about the reasonableness of excluding those viewpoints because of their content is unlikely. Indian River cannot perceive any manner by which it could apply the Third Circuit's reasoning to daily school activities in a way that forestalls more costly litigation.

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The *Dobrich* case illustrated for Indian River that uncertainty in the area of our constitutional rights can exact costs well beyond our First Amendment liberties: Strained educational budgets divert resources to support litigation; teachers, students, and communities are divided; and judges become enmeshed in the administration of public education. Indian River's only interest is being able to properly balance these liberties without compromising its mission to provide public education. Doing so requires better guidance than the Third Circuit provided. In the absence of additional clarification, unresolved questions about how to meaningfully apply the court's ruling will invariably lead to more costly litigation. This Court should provide that clarification.

CONCLUSION

For all of the foregoing reasons, *Amicus* urges the Court to grant the petition for a writ of certiorari.

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